Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF: WALTER L. HARVEY,

Petitioner

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF WISCONSIN

WALTER L. HARVEY
Petitioner
In Pro Per
P.O. Box 5715
Scottsdale, Arizona 85261
(602) 234-1931

88 pp

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court's refusal to determine the Petitioner's authority to act under the Power of Attorney, while finding he acted dishonestly in excess of its authority, as alleged in the Complaint, deny Petitioner due process of law?

2. Is the Wisconsin Supreme Court's decision in direct conflict with this Court's decision in In re Ruffalo?

3. Did the Wisconsin Supreme Court's refusal of testimony by Petitioner's witnesses deny due process of law?

4. Did the Wisconsin Supreme Court's failure to find that any element of the alleged offense was established by clear, convincing and satisfactory evidence deny Petitioner due process of law?

5. Did the Wisconsin Supreme Court deny Petitioner due process and equal protection of the law by imposing a discipline inconsistent with a prior decision with respect to jurisdiction outside its border?

6. Did the Wisconsin Supreme Court deny Petitioner a Sixth Amendment right to a jury trial?

7. Did the Wisconsin Supreme Court deny Petitioner a fair trial and fair investigation of the charge in violation of due process of law?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Wisconsin Supreme Court are those in the caption in addition to:

Complainant:
Wisconsin Board of Attorneys Professional Responsibility
110 E. Main Street, Suite 410
Madison, Wisconsin 53703
(608) 267-7274

Counsel for the Complainant is:

Thomas J. Basting, Sr., Esq.
BRENNAN, STEIL, BASTING & MacDOUGALL
One East Milwaukee Street
P.O. Box 1148
Janesville, Wisconsin 53547
(608) 756-4141

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Petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin entered in this action on November 14, 1995, and its Order denying Petitioner's Motion For Reconsideration entered in this action on January 17, 1996.

OPINION BELOW

The decision of the Wisconsin Supreme Court is reported at 539 N.W.2d 453 (1995) and is reprinted as Appendix A (A-1).

The Order denying Petitioner's Motion For Reconsideration is unreported and is reprinted as Appendix B (A-17).

BASIS FOR JURISDICTION

The Wisconsin Supreme Court issued its Opinion in this case on November 14, 1995. A timely Motion For Reconsideration was submitted by Petitioner on December 5, 1995. On January 17, 1996, the Wisconsin Supreme Court issued an Order denying the Motion For Reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law ***, and "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the U.S. Constitution provides in relevant part: "the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State."

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND. This matter involves a disciplinary proceeding against Petitioner who was licensed

to practice before the Wisconsin Supreme Court in 1962. Petitioner has been engaged in the practice of law since 1962, and prior to this matter he had never been disciplined in any manner by his profession either in Wisconsin or before any other court or administrative agency in the United States.

The Complainant, Wisconsin Board of Attorneys Professional Responsibility ("the Board"), alleged in a Complaint before the Wisconsin Supreme Court (A-18) filed on November 23, 1993 that Petitioner had engaged in conduct involving dishonesty, deceit and misrepresentation in violation of Wisconsin Supreme Court Rule 20:8.4(c) by improperly using a power of attorney naming him as agent to transfer to himself funds belonging to his close cousin, the late Elyda Morphy. The Board conceded that there was no attorney-client relationship between Petitioner and Ms. Morphy, and the Supreme Court agreed. The power of attorney was prepared by Ms. Morphy's attorney. The disciplinary matter, therefore, involved non-lawyer conduct and no criminal conduct with which Petitioner had been charged or convicted, and no issue relating to Petitioner's technical/professional competence to practice law.

A hearing was held before an attorney Referee appointed by the Wisconsin Supreme Court. The "Violation Phase" of the hearing began on July 7, 1994 and ended on July 11, 1994. An additional "Discipline Phase" of the hearing was conducted on October 14, 1994. On November 17, 1994 the Referee issued her "Report" to the Wisconsin Supreme Court finding a violation of the above-mentioned Supreme Court Rule and recommending that Petitioner's license to practice law in Wisconsin be revoked. Petitioner filed a timely appeal. On November 14, 1995 the Wisconsin Supreme Court issued its Opinion and Order (A-1) affirming the Referee's finding of a violation and affirming the Referee's recommendation to revoke Petitioner's license to practice in that State.

On December 5, 1995 Petitioner filed a timely Motion For Reconsideration which the Wisconsin Supreme Court denied by Order dated January 17, 1996 (A-17).

B. THE BOARD'S CASE. The monies transferred by Petitioner from his relative under the Power of Attorney occurred

between March 29, 1989 and September 19, 1989 in a series of bank withdrawals and sale of stock. Ms. Morphy passed away on October 1, 1989. No statement from Ms. Morphy or other evidence bearing directly on her intent to make or not to make gifts to Petitioner was offered by the Board. The Board's counsel stated in his closing argument that his case consisted of "circumstantial evidence" (A-34). He further argued in his Opening and Closing Arguments, in support of the one issue presented by the Complaint, that Petitioner had "absolutely no authority" under Ms. Morphy's 1987 Power of Attorney (hereinafter "POA") (A-33-35) to engage in self-gifting. The sole issue before the Referee was whether, as stated in the Complaint and argued by the Board, Petitioner had acted in excess of his authority under the POA.

C. PETITIONER'S DEFENSE. Petitioner's defense in the Violation Phase of the hearing consisted of his oral and written position, in response to the Complaint, that he did not exceed the authority of his fiduciary duty as defined in the POA in accordance with a 1970 Wisconsin Supreme Court opinion, and in accordance with the expert opinion of two attorneys. In the event the document was considered ambiguous or incomplete, Petitioner also offered additional evidence that Ms. Morphy had knowledge of and consented to the transfer of funds, including written documents signed by Ms. Morphy indicating her intent to make an inter vivos gift to Petitioner of the funds.

During the Discipline Phase of the hearing, Petitioner offered testimony from nine attorneys regarding Petitioner's reputation for honesty, integrity, good character, his contributions to the Wisconsin Bench and Bar by authoring for West Publishing Co. five authoritative volumes on Wisconsin Civil Procedure and Practice, his authoring of numerous other legal publications in the state, and by his founding and developing the State Bar CLE program under the annual 15 hour mandate when it was first ordered by the Court in 1976.

The testimony was undisputed and the Referee's Report indicates that Elyda Morphy and Petitioner's relationship was very close and affectionate and continued for 30 years. The

social worker who attended Ms. Morphy daily at the nursing home testified that she characterized Ms. Morphy's feelings about Petitioner as a natural object of affection and bounty; that she adored Petitioner and spoke of him almost daily; that he was like a son to her, a person on whom she thought the sun rose and set for whom she had complete trust and adulation. The evidence was undisputed that Ms. Morphy was quite intelligent, eccentric, very private, independent, not easily influenced by others, in control, and totally competent until the day of her death.

By arrangement with Petitioner prior to his commencing to utilize the POA in March, 1989, she retained the right to sign her own name and checks for her expenses which she did until less than a week of her death in October, 1989. She also received her own bank statements which reported Petitioner's use of the POA. This joint use of her bank accounts irrefutably established her knowledge and consent to the transfer of funds by Petitioner.

D. PETITIONER'S APPEAL TO THE WISCONSIN SUPREME COURT AND THE COURT'S OPINION. Petitioner appealed the Referee's finding of a dishonesty violation and recommendation of revocation to the Wisconsin Supreme Court. The appeal raised serious errors by the Referee resulting from a series of findings and rulings, based almost exclusively on negative inference and conjecture, and in several critical areas not based on a position argued by the Board. These findings permitted her to ignore the issue of Petitioner's fiduciary duty as defined in the POA, and to reach a conclusion without using the POA that Ms. Morphy did not authorize the gift transfers.

ALLEGED ERRORS AND THE COURT'S OPINION:

(1) A refusal by the Referee, affirmed by the Supreme Court, to define Petitioner's fiduciary duty under the POA.

The Referee's position as stated on both the record and in her Report that she did not need to reach the legal issue of whether Appellant violated a fiduciary duty under the POA was prem

mised on her post-trial conclusion that Petitioner falsified the documents he introduced into evidence (but which she had admitted into evidence at trial as authentic/genuine).

She stated at trial on the Record:

> "I found those documents to be nongenuine and the testimony surrounding them to be incredible. Therefore, my conclusion as to the respondent's violation was based on factual grounds. I never reached the mixed issue of law and fact about whether or not the language of the POA allowed self-gifting by the attorney in fact". (A-38-39).

The Wisconsin Supreme Court rebuked Petitioner's error on appeal that his fiduciary duty under the POA had not been decided, and upheld the Referee stating:

> "The referee stated she did not reach those legal issues because the ultimate issue was whether Attorney Harvey breached his fiduciary duty by using the power of attorney in a manner inconsistent with the grantor's intentions and wishes. Thus, the referee's denial of Attorney Harvey's untimely motion to reopen the violation phase of the disciplinary hearing for the presentation of the testimony of two attorneys on the extent of authority in the power of attorney was proper". (A-12-13)

Although this was the issue charged in the Complaint --- using the POA in excess of its authority -- the Court permitted the Referee to substitute Ms. Morphy's intent outside of the POA, post-trial, as the issue on which a violation of the Complaint was found, thereby abandoning the Complaint.

Rendering the Referee and Court's reasoning even more defective and in violation of due process, the Board's counsel in accordance with its Complaint fully argued and briefed to the Referee and the Supreme Court the issue of whether the POA permitted self-gifting and the nature of the fiduciary duty thereunder. The Board understood that the only manner in which Petitioner obtained use of Ms. Morphy's funds was

through use of the POA. The Board's argument to the Referee and Court was that the POA did not authorize Petitioner to make gifts to himself or others. (A-33-35) Petitioner's counsel counter-argued that the language of the POA gave Petitioner his authority to so act, and that it was legally impermissible to determine whether the non-lawyer conduct of Petitioner in this matter breached any fiduciary duty to Ms. Morphy without determining the extent of that duty under the POA, in keeping with the Wisconsin Court's holding in Alexopoulos v. Dakouras, 487 Wis. 2d 32, 179 N.W.2d 836 (1970). In this case the Court stated that the POA is a written document which authorizes the agent for the principal to act **to the extent set forth therein** (487 Wis2d 32, at 39, 40,; emphasis supplied).

(2) **Petitioner argued to the Wisconsin Supreme Court that he was denied due process of law by the Referee's erroneous findings post-trial that Petitioner falsified key documents without permitting Petitioner an opportunity to defend against the charge.** Petitioner argued to the Court that these post-trial findings constituted more serious charges than those in the Complaint, and turned the case in a new direction. The Wisconsin Court responded by stating that the Referee's improper consideration of physical testimony "might have merit", but that no harm occurred due to the Referee's finding that those documents were not evidence of Ms. Morphy's intent (A-12).

The Court asserted that the Referee's findings did not "serve as the basis of a conclusion in respect to additional misconduct", since she only used the non-genuine document issue as an "aggravating factor in determining discipline to be recommended" (A-12). Thus, the Court credited the Referee's post-trial finding of falsification, which was never litigated, and which was then used by her and the Court as one of the principal reasons for revocation of Petitioner's license (A-30). Since the Court acknowledges as error ("having merit") the Referee's improper handling of physical evidence, then it cannot use or permit her to have used that same evidence for purposes of aggravation, or for any other purpose adverse to Petitioner.

The three exhibits of Petitioner's at trial which the Referee

found falsified post-trial were RX 3 (A-23); RX 7 (A-24); and RX 8 (A-25). The Referee erroneously characterized these documents as "the linchpin of the respondent's case" (A-28). Early in the trial and before these documents were offered into evidence by Petitioner, the Board agreed and stipulated with Petitioner's counsel that neither one were going to have a problem as to authenticity of documents that have been used routinely in the course of these proceedings, which included these documents in question (A-31). The record shows that the Board was in possession of these three documents for two years before the hearing, submitted by Petitioner as part of his initial response to the grievance. At no time was the authenticity/genuiness of these documents questioned by the Board prior to the Complaint being filed on November 9, 1993.

At trial the Board objected to RX 3 and RX 8 on grounds of relevancy without oral argument; the Board made no objection to admissibility of RX 7 (A-31-32). The Referee overuled the Board's objection to RX 3 and 8, and thus admitted the documents as authentic/genuine. The Board did not object to RX 7, and the Referee admitted this document as authentic/genuine. In Wisconsin, the Rules of Evidence and case law establish that authentication is a condition precedent to admissibility. Sec. 909.01, Wis. Stats.; City of New Berlin v. Wertz, 105 Wis.2d 670, 314 N.W.2d 911 (1981). Clearly, if Petitioner had a burden to establish authenticity/genuineness, as the Court stated (A-11), then he succeeded because the Referee admitted them into evidence.

The Court's statement that the Referee's post-trial actions were error which "might have merit" absolutely precluded it from permitting her to conclude, and from permitting it to conclude, that falsification of the documents could be used against Petitioner post-trial in aggravation of the offense. The Wisconsin Court effectively entrapped Petitioner by permitting a new finding of dishonest conduct after the hearing was completed, based on Petitioner's own evidence, and then permitted that evidence to be used against him as aggravation of the charged offense in order to support and achieve license revocation.

(3) Petitioner argued to the Court that in the discipline

phase of the trial the Referee denied him due process to a fair trial by refusing to consider the expert testimony of two attorneys who agreed with Petitioner's right to so act under the POA. The Supreme Court did not address the alleged error, and denied Petitioner due process of law by refusing to permit, without explanation, this testimony that he did not act in excess of his authority in the POA, as alleged in the Complaint.

(4) **Petitioner argued to the Referee and the Supreme Court that any discipline imposed should not exceed a public reprimand based on a 1991 Supreme Court decision invoking that discipline for an attorney, like Petitioner, who did not intend to return to Wisconsin to live or to practice law.** The Supreme Court rejected Petitioner's use of its 1991 decision without explanation or analysis of any kind (A-14). Petitioner was denied due process and equal protection of the law by the Court's denying to him discipline no greater than a public reprimand in accordance with its prior decision.

(5) **Petitioner argued to the Court that the Referee failed to require of the Board that it prove its case under the proper standard for burden of proof in Wisconsin.** The Court rejected this argument as an "unsupported assertion" (A-14).

The burden of proof in Wisconsin for the Board is "clear, convincing and satisfactory". Disciplinary Proceedings Against Bengston, 116 Wis.2d 650, 342 N.W.2d 744 (1984). The Court does not refer to or analyze this standard in its opinion, and the Referee does not mention this standard in her Report. Instead, the Referee used a "substantial doubt" standard which she articulated in her Report by the statement:

> "...the Board raised substantial doubts about the Respondent's credibility and the genuineness of his key documents ... the Board has met, if not exceeded, its burden of proof" (A-29).

The Referee effectively shifted the entire burden of proof to Petitioner of clear, convincing and satisfactory proof, and then determined by a "substantial doubt" that Petitioner had failed to meet that burden.

REASONS FOR GRANTING THE PETITION

For almost a century it has been established that disbarring a lawyer from the practice of his profession, though done to protect the public rather than with the intent of punishing the lawyer, has the effect upon him of punishment, and that laws with such an effect must meet the tests applicable to a penal statute. Ex parte Garland, 4 Wall. 333 (1867). To apply to an attorney standards of conduct which could not fairly have been anticipated, and to punish him or her for violating those standards, would be at "war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Pierce v. United States, 314 U.S. 306, 311 (1941). Thus it is that this Court has held that procedural due process, which includes fair notice of the charge, is guaranteed an attorney in a disciplinary proceeding. In re Ruffalo, 390 U.S. 544, 551-52 (1968). In Ruffalo, the Court stated: "These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence...." Id. at 551. The Wisconsin Supreme Court has held that an attorney's constitutional due process right involves "only his right to prior notice of charges, his right to prepare to defend these charges and his right to a full hearing on these charges" (State v. Hersh, 73 Wis.2d 390, 398, 243 N.W.2d 178 (1976).

This Petition should be granted because the Wisconsin Supreme Court has flagrantly violated these constitutional mandates in direct conflict with previous opinions of this Court.

I. THE WISCONSIN SUPREME COURT'S REFUSAL TO DETERMINE THE PETITIONER'S AUTHORITY TO ACT UNDER THE POWER OF ATTORNEY, WHILE FINDING HE ACTED DISHONESTLY IN EXCESS OF ITS AUTHORITY, AS ALLEGED IN THE COMPLAINT, DENIED PETITIONER DUE PROCESS OF LAW.

In this case the Wisconsin Court did not find that Petitioner acted dishonestly by using the POA "in excess of its authority" --

the charge contained in the Complaint. Rather, the Court affirmed the Referee's finding that she did not need to reach that issue because the Referee found that Petitioner acted dishonestly by taking funds of Ms. Morphy which she did not intend, without regard to the authorization in the POA.

In addition, the Wisconsin Court's refusal to reach the issue of the fiduciary duty under the POA denied Petitioner his right to a determination of his authority under the POA, which was the sole issue with which he was charged in the Complaint.

The Court's findings, affirming the Referee's findings, of Ms. Morphy's intent and authorization outside of the POA violated the cardinal rule that the legal effect of a power of attorney cannot be altered by proof of what one or both parties understood the legal effect to be. The courts are not at liberty to speculate as to the subjective intention of the parties; they are charged with the duty of ascertaining the meaning of the written language. They cannot give effect to any intention which is not expressed by the language of the instrument. Thus, the nature and extent of the authority conferred by a power of attorney are to be determined from an inspection of the instrument itself, and parol evidence is not admissible to establish the import of the instrument. The specific language of the document must be pursued with legal strictness, and only where the instrument is ambiguous or incomplete may the acts of the parties themselves and other circumstances be permitted to throw a light on the question. 3 Am. Jur. 2d, Agency, secs. 35 & 371; 3 Jones on Evidence, sec. 1618 (1972); 9 Wigmore on Evidence, sec. 2425ff (1981); Mechem on Agency (2nd Ed.), sec. 775; 4 Williston on Contracts (3rd Ed.), sec. 631; Long v. Schull, 184 Ct. 252, 439 A.2d 975 (1981); Von Wedel v. McGrath, 180 F. 2d 716 (CA3 NJ 1950); DiBlasi v. DiBlasi, 114 Ct. 539, 159 A. 477 (1931); Brown v. Laird, 134 Or. 150, 291 P. 352, 72 ALR 877 (1930).

Wisconsin is in accord. In re Spring Valley Meats, Inc. v. Bohen, 94 Wis.2d 600, 288 N.W.2d 852 (1980); Hampton Plains Realty Co. v. Cohen, 214 Wis. 128, 252 N.W. 572 (1934); Marshall v. Wittig, 213 Wis. 374, 251 N.W. 439 (1933); Greene v. American Malting Co., 153 Wis. 216, 140 N.W. 1130 (1913); and Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316,

85 N.W. 1010 (1901).

Despite the principal's intent to make a gift, the power of attorney cannot be used by the attorney in fact to make the gift if the instrument does not permit it. Miyuki Okihara v. Clark, 71 F. Supp. 319, 322 (D.C. Hawaii, 1947). Likewise, if the instrument permits gifting, then it controls the actions of the attorney in fact and the principal's recourse is to revoke or alter the power of attorney itself. The Wisconsin Court's determination of Ms. Morphy's intent outside of the POA is defective without first determining that the POA was either incomplete or ambiguous, and without taking into consideration that her intent, if it was inapposite to the POA, could have been expressed in a revocation or alteration of the document itself at any time during the six months she knew that Petitioner was using the POA. In Wisconsin the law was that a revocation of a POA, to be effective, must be of the level of formality as the document creating the agency. See Best v. Gunther, 125 Wis. 518, 104 N.W. 82 (1905).

The Wisconsin Court revoked Petitioner's license on the assumption and conjecture that, had Ms. Morphy lived, she would in the future express an objection to the gifts. The Court, however, points to no evidence in the record to support this conjecture. Because of circumstances interrupting her ability to express that consent to the Court, the assumption reached is that Petitioner acted dishonestly premised on her lack of intent and consent. The fact is, however, that the Board did not show by clear, convincing and satisfactory evidence that Ms. Morphy did not consent, or that in the future she would not have consented to the use of the POA for gifts, or that Petitioner violated his fiduciary duty under the POA based on the specific language of the document.

The position of the parties at trial centered on Alexopoulos v. Dakouras, 48 Wis. 2d 32, 179 N.W.2d 836 (1970), which held: (1) that the POA is a written document which authorizes the agent for the principal to act **to the extent set forth therein** (487 Wis.2d 32, at 39,40; emphasis supplied); and (2) that the power of attorney can provide for gifting if its language evidences "an unlimited or unbridled power of disposition", as well as if it contains a specific gift giving provision.

Petitioner argued that the 1987 POA (A-21) contains such language in two places. In the middle of the paragraph authorizing specific acts as agent, the document states:

> "... to manage, care for, supervise and control any estate or property which I may own and to do and perform any act with respect thereto which my attorney determines to be proper". (Emphasis supplied).

In the living trust provision at the bottom of the POA (A-22), it is stated that the attorney-in-fact may enter into a revocable living trust:

> "on such terms as my attorney determines are for my best interests". (Emphasis supplied).

The Petitioner cited to the Wisconsin Court and Referee further specific legal authority supporting Petitioner's interpretation of the POA. The Supreme Court of Rhode Island has held that a will giving testatrix's husband power to "grant, convey, assign and deliver at such time, and upon such terms and conditions as he might deem proper" all of the devised estate was broad enough to include a conveyance by way of gift. Ortman v. Streeter, 23 A. 2d 189 (R.I. 1941). The phrase "as he might deem proper" is virtually identical to the language in the POA here -- "which my attorney determines to be proper."

The Wisconsin Court denied Petitioner due process of law by failing to determine the Petitioner's fiduciary duty under the POA, a violation of which was the charge against him in the Complaint by the Board (A-19, para. 5). In the absence of such a determination, it was legally impermissable for the Court to have found that Petitioner acted "in excess of the authority" given to him in the POA as he was charged. In addition, the Court revoked Petitioner's license without permitting him to know in advance of the proceeding that the offense of dishonesty could and would be determined not on the basis of his fiduciary duties as defined in the POA, but rather based on misconduct as determined outside of the authority of the POA by the trier of fact -- the Referee.

Finally, the Wisconsin Court denied due process because of its affirmation of the Referee's findings that she did not need to reach Petitioner's fiduciary duty under the POA since she found, post-trial, that physical evidence submitted by Petitioner was falsified, a charge that was not contained in the Board's Complaint and for which Petitioner was not prepared to defend against, did not, and had no opportunity to do so. The Court affirmed its position in this regard by stating:

> "The referee found that Ms. Morphy did not intend to make a gift to Attorney Harvey of her funds while she was alive, rejecting as non-genuine three documents he offered to support his contention that she intended to do so". (A-7).

II. THE WISCONSIN COURT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN IN RE RUFFALO.

It is unmistakably clear that the Wisconsin Court permitted the Referee, post-trial, to find Petitioner guilty of falsifying documents, submitted in his defense, for which he was never charged and against which he had no opportunity to defend. And, the Court then based its order of license revocation in substantial part on that finding.

This Court struck down such entrapment in the disciplinary case of In the Matter of John Ruffalo, Jr., 390 U.S. 544, 551, (1968):

> "These are adversary proceedings of a quasi-criminal nature. CF In re Gault, 387 U.S. 1, 33, 87 S.Ct. 1428, 1446, 18 L.Ed.2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh".

In Ruffalo the Bar Association (Complainant) suspended the hearing and amended the charges, and thus argued that due process was not denied because Petitioner had several months to respond to the new charges. This Court, however, responded that the new charges followed Petitioner's testimony, and that he may well have been lulled into a false sense of security in that he had no reason even to suspect that by his own testimony, he would be irrevocably assuring his disbarment under charges not yet made.

The instant case represents a denial of due process much more egregious than in Ruffalo, because here the post-trial findings of the Referee that Petitioner falsified documents were never even translated into new charges. The Court effectively permitted post-trial amendment of the charges against Petitioner by affirming the Referee's post-hearing findings of non-genuineness. This occurred after the Referee had accepted these documents into evidence at the trial without any forewarning that having done so she would, once the record was closed, sua sponte evaluate their genuineness without putting Petitioner on notice that additional evidence was needed to establish their authenticity and permitting him an opportunity to defend against the additional misconduct.

The Referee characterized the three documents (App-D, E & F) as "the linchpin of the respondent's case (A-28). RX 3 (A-23) was admitted over the Board's relevancy objection without argument. RX 7 (A-24) was admitted without objection. RX 8 (A-25) was admitted over "best evidence" and relevancy objections, again without argument. (A-31-32). The Board at no time claimed that these documents were not genuine. Only in her report, after the evidence was concluded and the record closed, and Petitioner's opportunity to refute had passed, was the genuineness issue first raised by the Referee. Petitioner lost his license to practice his profession primarily because the Referee created a scientific issue, became the prosecutor, and acted as judge without alerting Petitioner to existence of the issue. Consequently, the Referee denied him the right to present evidence or even to have his argument on the subject heard.

After the case was closed, the Referee made an unprecedented foray into an area of science in which she apparently had no

training and in which she did not have the benefit of any expert testimony. She then based her finding that the Board had carried its burden of proof by asserting that "the Board raised substantial doubts about the Respondent's credibility and the genuineness of his key documents" (A-29); and, she concluded by basing her recommendation of revocation in large part on the fact "that the Respondent compounded his misconduct" by submitting "two non-genuine documents as well as added a line to a third, original document, in an attempt to cover for his misconduct".

She specifically stated that she recommended revocation due to Petitioner's "attempts to hide his misconduct...by submission of non-genuine and altered documents" (A-30). This is the principal reason she found the Petitioner to have acted dishonestly, and the principal reason she recommended revocation. Yet, the Board had possession of these documents several years prior to the trial, and the Board agreed with Petitioner's counsel as the trial opened that there would be NO CHALLENGE TO THE AUTHENTICITY of these documents (A-31). As in the Ruffalo case, supra, Petitioner was lulled into a false sense of security because he had no reason to suspect that his own testimony would be irrevocably assuring his disbarment under charges not yet made.

The Board, acting on the Court's behalf, could have charged Petitioner under the Court's Rules of Professional Conduct with a violation of SCR 20:3.3, Candor Toward The Tribunal, which prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal, and offering evidence that the lawyer knows to be false. There were no such charges.

The Wisconsin Court and others have long recognized that determining the genuineness of documents is the province of experts. Colbert v. State, 125 Wis. 423, 432, 104 N.W. 61 (1905); Estate of Stanisgewski, 28 Wis.2d 403, 408, 137 N.W.2d 57 (1965); see also Carter v. Equitable Life Assurance Society ofthe United States the United States, 499 So.2d 1170, 1172 (La. App. 1986 -- "The necessity of assistance from a handwriting expert in determining the validity of the signature is self-evident"). If the Referee had timely revealed that the genuineness of these key documents was in question, Petitioner could have come

forward with experts who would have shown that the science of document analysis has become so sophisticated that expert testimony is required to prove that a signature or document is non-genuine. Petitioner was prevented from litigating that issue and from developing any record or argument to show that the conclusions of the Referee, acting as her own expert, were wrong. This is the most egregious example of denying an accused the right to confront and cross-exmaine his/her accusers as guaranteed by the Sixth Amendment and applicable to the states through the due process clause. Pointer v. Texas, 380 U.S. 400 (1965); Coy v. Iowa, 487 U.S. 1012 (1988).

After raising this error to the Wisconsin Supreme Court, that Court found that the error "might have merit" but for the Referee's determination that the documents were "not evidence of Ms. Morphy's donative intent, testamentary or otherwise" (A-12). But the Court had earlier in its opinion explained its position as follows:

> "The referee found that Ms. Morphy did not intend to make a gift to Attorney Harvey of her funds while she was alive, rejecting as non-genuine three documents he offered to support his contention that she intended to do so". (A-7)

Here the Court unmistakably affirms that Ms. Morphy's intent was arrived at by the conclusion that Petitioner's documents were falsified. Then the Court proceeded to affirm the Referee's findings of dishonesty, based on falsification, and her recommendation of revocation, also based on falsification. But that Court may not uphold the finding of falsification once it holds that the error "has merit". If the error has merit, then there can be NO USE of those findings against Petitioner.

The Court's position appears to be that the Referee's post-trial findings constituted "harmless error" under sec. 805.18, Wis. Stats. which permits the Court to disregard any error or defect in the proceedings that shall not have affected the substantial rights of the adverse party. The test under this statute to determine that the error was not harmless requires that to some degree of probability, not merely possibility, the error complained of has changed the outcome of the case. There can be little doubt

that the Referee's post-trial findings of falsification changed the outcome of this case.

This Court should grant this Petition because the Wisconsin Supreme Court's decision directly contradicts this Court's opinion in Ruffalo.

III. THE WISCONSIN COURT'S REFUSAL OF TESTIMONY BY PETITIONER'S WITNESSES DENIED PETITIONER DUE PROCESS OF LAW.

The Wisconsin Supreme Court did not address the error raised by Petitioner that the Referee improperly excluded testimony at trial from attorneys who agreed with Petitioner's view of his fiduciary duty under the POA. The witnesses were two attorneys who would have testified that two provisions of the POA represented "unlimited or unbridled power of disposition" within the meaning of the Court's holding in the Alexopoulos case, supra, thereby interpreting the POA to have authorized the self-gifting.

Petitioner asked these witnesses to testify at the Disciplinary Phase of the hearing held on October 14, 1994. In addition, Petitioner moved at this time that the Referee reconsider her previously announced finding of a violation and permit the testimony of these two witnesses on the merits. The Referee refused the testimony for both purposes (A-37-39). As to the merits, she affirmed that the testimony would have been relevant and acceptable testimony; however, she then refused the testimony on the basis that she had already found the documents submitted by Petitioner to be non-genuine, and that therefore she did not intend to reach the issue of whether the POA contained authority which would have permitted self-gifting by Petitioner. As to mitigation of the offense, she stated that the testimony "would have no probative value now on culpability as it applies to discipline" (A-39).

The Wisconsin Court affirmed by asserting that the testimony was "untimely" and the Violation Phase of the hearing could not be "reopened" since the Referee had already determined

that Petitioner breached his fiduciary duty under the POA. (A-12-13)

The Wisconsin Court deprived Petitioner of due process in this ruling because the disciplinary hearing had not been adjourned or closed. Even had the record been closed, the Court had just previously authorized the reopening of a case on the merits in order to permit additional testimony on an issue which was not fully litigated by the parties. Disciplinary Proceedings Against Frank X. Kinast, 192 Wis.2d 36, 530 NW2d 387 (1995). The record in that case reveals that after the case before the Referee was closed and the Referee's Report had been submitted to the Court in May, 1994, the Board (Complainant herein) moved the Court to reopen the evidence and present additional testimony on an issue which had not been litigated by the parties. The Court on June 14, 1994 granted the Board's Motion, further hearings were held and the Referee submitted an "Amended Report" to the Court on August 30, 1994. Certainly the procedure authorized in the Kinast case by the Court permitted the Referee to take additional testimony on the merits as Petitioner requested, especially where the Referee affirmed that the testimony "would have been relevant and acceptable".

The result is that the Wisconsin Court revoked Petitioner's license to practice law without considering the testimony of other attorneys who were in agreement with Petitioner's authority for Petitioner to so act under the POA. The testimony was not only relevant to the consideration of culpability and mitigation, but it was also by definition relevant to the issue of the fiduciary duty under the POA which the Referee HAD NOT YET decided, and in fact which was never decided by either the Court or its referee. Since the testimony that was refused would have spoken clearly and eloquently to the issue of any alleged breach of a fiduciary duty under the POA, there was no reasonable justification for exclusion of these witnesses. This thought is best expressed by Justice White in his concurring opinion in the Ruffalo case, supra:

> "I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact the conduct is unethical

if responsible attorneys would differ in appraising the propriety of that conduct". (390 U.S. 544, at 556).

The Wisconsin Court has deprived Petitioner of due process of law in denying to him the testimony of these expert witnesses which goes directly to the issues and alleged misconduct as charged in the Complaint. Its actions are in direct conflict with this Court's decision in the Ruffalo case, supra.

IV. THE WISCONSIN COURT'S FAILURE TO FIND THAT ANY ELEMENT OF THE ALLEGED OFFENSE WAS ESTABLISHED BY CLEAR, CONVINCING AND SATISFACTORY EVIDENCE DENIED PETITIONER DUE PROCESS OF LAW AND SHIFTED THE BURDEN OF PROOF TO PETITIONER.

The Board's burden was to establish that Petitioner violated his fiduciary duty by using the POA in excess of its authority with proof that was clear, satisfactory and convincing for every element of the offense. Disciplinary Proceeding against Bengston, 116 Wis.2d 650, 342 N.W.2d 744 (1984). Neither the Wisconsin Court nor the Referee discussed the standard of proof, or analyzed the various elements required to be proven by that standard, in order to find that Petitioner acted dishonestly and in violation of a fiduciary duty. Rather, the Court writes off Petitioner's error by the Referee as an "unsupported assertion" without further comment or explanation (A-14). The Wisconsin Court, therefore, permitted the Referee to use her stated "substantial doubt" standard (A-29) for reviewing the evidence, a standard which she revealed for the first time in her written Report AFTER the evidentiary hearing. A "substantial doubt" is not sufficient proof to support a charge as serious as fundamental dishonesty, particularly and especially when it results in loss of a professional license. The Referee, in fact, shifted the burden of proof to Petitioner by stating that the Board's burden of proof was met by raising substantial doubts about the genuineness of Petitioner's key documents. The Wisconsin Court agreed in holding that:

"The referee found that Ms. Morphy did not intend to make a gift to Attorney Harvey of her funds while she was alive, rejecting as non-genuine three documents he offered to support his contention that she intended to do so". (A-7)

As argued above, Petitioner was therefore entrapped in violation of this Court's decision in Ruffalo, supra. When a federal court bases its findings upon an erroneous legal standard, the appellate court reviews the record de novo. In re Heriberto Medrano, 956 F2d 101 (5th Cir. 1992). The Wisconsin Court denied Petitioner due process in not reviewing the record of this case de novo in view of the clear error of the Referee. This was particularly prejudicial because every element of the charged violation was contested by Petitioner. The decision cannot be sustained because clear, convincing and satisfactory proof of Ms. Morphy's intent cannot be based on Petitioner's credibility.

V. THE WISCONSIN COURT DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY IMPOSING A DISCIPLINE INCONSISTENT WITH A PRIOR DECISION.

The Wisconsin Court stated that:

"The referee rejected Attorney Harvey's position that because he has stated his intention never to practice law in Wisconsin again, the protection of the public does not require suspension or revocation of his license". (A-11)

"We reject Attorney Harvey's assertion, as did the referee, that in the event we determine that he has engaged in professional misconduct, a private or public reprimand should be imposed". (A-14)

The Wisconsin Court in Disciplinary Proceedings Against Jacobs, 161 Wis.2d 392, 467 NW2d 783 (1991) held that a public reprimand was sufficient discipline where the offense was not client related but of a personal nature, and where the attorney

was no longer practicing law in Wisconsin. There the Court stated at 467 N.W.2d 783, 792:

> "We also note that Attorney Jacobs testified that he will not practice law in Wisconsin again. Consequently, a suspension of his license to practice law is unnecessary, either as an appropriate response to the seriousness of his misconduct or to protect the Wisconsin public and its legal system from his further misconduct".

Petitioner's stated intent on the record not to practice law in Wisconsin again, and that he had left the state in 1987 and had represented no new clients in the state since that date, was acknowledged by the Court. It also acknowledged that the conduct of Petitioner did not arise from an attorney/client relationship. It then rejected the reasoning previously expressed in the Jacobs case, supra, and without explanation. In addition, the Court also had evidence in the record that currently and in the past five years, since the date of the violation, no additional misconduct or need for discipline had occurred either in Wisconsin or elsewhere. The discipline rendered to Petitioner in this case is in direct conflict with the discipline which the Wisconsin Court imposed in the Jacobs case, and therefore denies Petitioner his constitutional right to due process of law and equal protection of the law. Further, while it is well settled that a state Supreme Court has "a compelling interest" in the regulation of the practice of law within its borders, Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), the only purpose in so harshly disciplining Petitioner, given his acknowledged intent not to practice law again in Wisconsin, was to terminate his practice of law and livelihood outside of Wisconsin. This is not appropriate regulation of the practice of law within the jurisdiction of the Wisconsin Supreme Court. The Court removed Petitioner's property right to his license arbitrarily, capriciously, and discriminatorily in violation of his constitutional rights.

VI. THE WISCONSIN SUPREME COURT DENIED PETITIONER A SIXTH AMENDMENT RIGHT TO A JURY TRIAL

The Wisconsin Supreme Court's Disciplinary Rules do not permit attorneys who are charged with disciplinary violations a jury trial (SCR Chapter 21, Enforcement of Attorneys Professional Responsibility; SCR Chapter 22, Procedures For The Board Of Attorneys Professional Responsibility, 1996).

The Sixth Amendment right to a jury trial applies to the States through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). In the Ruffalo case, supra, this Court announced that attorney disciplinary proceedings are of a "quasi-criminal nature" (390 U.S. 550, 551). The Court has also established that "a potential sentence in excess of six month's imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty'." Baldwin v. New York, 399 U.S. at 69, n.6 (emphasis supplied). And, the Court has declared that a 90-day license suspension for a DUI offender is not that significant as a Sixth Amendment matter. Blanton v. City of North Las Vegas, Nevada, 489 U.S. 538, 544, n. 9. Clearly, the loss of a property right in the license to practice law cannot be considered either petty or insignificant. Thus, in a proceeding where that can be the potential result, the attorney must be entitled to a constitutional right to a jury trial.

The Wisconsin Supreme Court has stated that its professional conduct rules define attorney misconduct to include conduct which violates a criminal statute if the violation involves moral turpitude, citing its rule SCR 21.05(1). In the Matter of Disciplinary Proceedings Against Glas-Schroeder, 113 Wis.2d 672, 335 N.W.2d 621 (1983). The findings of dishonesty and falsification of court documents in this case could qualify as the subject of criminal sanctions under the Wisconsin Criminal Code.

In the absence of a controlling statute, this Court has held that procedural due process does not require that the attorney have a jury trial. Ex Parte Wall, 107 U.S. 265 (1882). Authority need not be asserted for the proposition that Courts have "inherent power" to suspend or remove from an attorney his

license to practice. However, the question here focuses on when the inherent regulatory and licensing authority of the Court contravenes what otherwise would be that person's constitutional right to a jury trial under the Sixth Amendment.

It is clear that a jury trial exists for an accused person in actions for criminal conversion of personal property. If that person happens to be an attorney at law who is defending against the identical issues before the Wisconsin Court which has licensed him to practice, he is denied a jury trial. Yet, at stake in the action before the licensing Court is not only the Court's ultimate determination requiring the attorney to reimburse the converted funds, but more importantly the loss of a property right -- his license to practice law -- determined in a hearing involving charges which this Court has adjudged to be "quasi-criminal" in nature.

Petitioner strongly urges this Court to grant this Petition on the issue of whether his right to a jury trial under the Sixth Amendment has been unconstitutionally denied by the Wisconsin Supreme Court. These issues, of course, also impact the Court procedures in all states which do not permit a jury trial in attorney disciplinary proceedings. Petitioner is aware of two states that permit a jury trial in these type of proceedings. The State of Georgia permits a jury trial in attorney disciplinary cases (State Bar Rule 4-214, Respondent's Right To Trial By Jury; Venue; Special Questions, 1996), and the State of Texas permits a jury trial in attorney disciplinary cases (Texas Rules of Disciplinary Procedure, Rule 3.06, Trial By Jury, 1996).

VII. THE WISCONSIN SUPREME COURT DENIED PETITIONER A FAIR TRIAL AND FAIR INVESTIGATION OF THE CHARGE IN VIOLATION OF DUE PROCESS OF LAW.

The Wisconsin Supreme Court has held that there is no fundamental due process permitted in its Board's investigation of a disciplinary case since due process is provided in the hearing which is held following issuance of a Complaint by the Court's Board, which hearing is held before a Wisconsin attorney Referee

appointed by the Supreme Court. See In the Matter of the Disciplinary Proceedings Against Eisenberg, 117 Wis.2d 332, 344 N.W.2d 169 (1984); State v. Hersh, 73 Wis.2d 390, 243 N.W.2d 178 (1976).

The attorney disciplinary system in Wisconsin is established by Supreme Court Rules under which the Court administers each detail of the process before it is finally asked to review the errors in the process which it administers. In a real sense, it can be said that the Court is reviewing itself. These procedures do not afford attorneys in that state with a fair trial or fair appellate process conducted by an independent and objective tribunal.

The Supreme Court is the investigator and issues the Complaint against an attorney through its Board (SCR Chapters 21 and 22); it appoints and employs the Referee (SCR 21.09(4), Procedure) and approves and employs the attorney chosen by its Board to prosecute the case (SCR 21.08(3), Procedure); it reviews the actions of these persons whom it has appointed and administered in hearing the appeal from the Referee, and then it reviews and in most instances approves the discipline recommended by the Referee and its Board. The review is not a de novo review, but one in which findings by the Referee will not be overturned unless "clearly erroneous". Disciplinary Proceedings Against Swartwout, 116 Wis.2d 380, 342 N.W.2d 406 (1984). There is no independent, objective, arm's-length third-party in the form of a judge or jury who provides to the attorney a forum which is free of bias, partiality, and the appearance of partiality. The Court gives to its Referee in these proceedings the powers of a judge trying a civil case (SCR 22.03, Referees), and it requires that the proceedings be conducted as a trial of a civil action to the trial court (SCR 22.14, Hearing). However, these Rules deny attorneys impartiality in their administration, and deny judicial independence in their review by the very Court which appoints, employs and administers these persons in their official duties. Indeed, the Court has ordered that the Referee, members of its Board, Board staff, Board counsel and attorneys designated by the Court to handle disciplinary proceedings "are acting on behalf of the Supreme Court" with respect to its rules and orders regulating the conduct of attorneys (SCR 21.15, Official Duties). This particular Court

Rule actually violates the Rules dictated by the Supreme Court in its own Code of Judicial Ethics (SCR Chapter 60, Code Of Judicial Ethics):

> "A judge should be temperate, attentive, patient, industrious and, above all, impartial. A Judge should adminster the law free of partiality and the appearance of partiality". (SCR 60.01(3), Standards).

(1) Petitioner was denied an impartial judge and tribunal. Under the Supreme Court Rules, its Board of Attorneys Professional Responsibility ("Board") investigates attorney discipline matters, administers discipline, files a Complaint for a formal hearing before a Referee, and becomes the Complainant in that proceeding. The Court has mandated that its Board shall consult with the State Bar Board of Governors in reaching an annual budget and prior to proposing that budget to the Supreme Court (SCR 21.01 (4) (f)). The Referee appointed to hear Petitioner's case is a Wisconsin attorney, and at the time she conducted the hearing in 1994 she was a member of the State Bar Board of Governors. Thus, the Referee in Petitioner's case, as a member of the Board of Governors, was superintending and overseeing the annual budget of the Complainant which would include its staff and attorneys. This fact and connection alone deprived Petitioner of impartiality in the proceeding. It is improper for the Wisconsin Court to employ and appoint a Referee who is simultaneously acting in an official capacity as a member of the State Bar Board of Governors since the dual official capacity of both Referee and member of the Board mandates and authorizes a close working relationship with the Board (Complainant herein).

Lack of impartiality and objectivity by this Referee is exhibited in the unprecedented series of findings, rulings, and errors described herein which indicate that Petitioner's treatment at the hands of this Referee was manifestly unfair. In addition, this type of conduct continued after the trial had concluded. After her written Report was filed with the Supreme Court and prior to filing an appeal to the Court, Petitioner made an effort to seek a New Trial in accordance with the Wisconsin Rules

of Civil Procedure which govern these disciplinary proceedings (SCR 22.14), by filing with the Court a Motion For An Extension Of Time To File Motion For A New Trial. In response to the Motion, the Referee addressed a letter to the Supreme Court (A-40) which represents an inflammatory, extra-judicial off-the-record direct contact with the Court concerning the merits of Petitioner's case.

The Referee concluded in the letter that she no longer had any jurisdiction over the disciplinary matter, but before reaching that conclusion in the last paragraph of the letter, she completely berated Petitioner and his counsel, and then proceeded to inform the Court how she would decide the Motion if she had jurisdiction. The letter gives every appearance of a blatant attempt to influence the Wisconsin Court. It represents an egregious ex parte communication with the Court; it bespeaks of conflict of interest, and it is a direct violation of the Court's Code of Judicial Ethics, SCR 60.16, Comment, that:

> "A judge shall not, while a judicial proceeding is pending, make any comment upon its merits or make any comment which might affect its outcome or preclude a fair trial".

The Referee's letter states that Petitioner's motion related to her Report as containing serious errors and omissions, and appears to be based in material part on matters that were not asserted or proved by the Board about which the Petitioner desired to offer more evidence (A-41-42). The Referee rebuked the motion and stated that:

> "...there is no provision for motions for reconsideration or new trials after the submission of the referee's report; the procedure is to file an appeal of the report if there is alleged error in the report or the underlying proceedings". (A-44)

However, the Referee was patently incorrect since the Wisconsin Court had just previously provided precedent for just such a motion by Petitioner in the Kinast case, supra. As reported above (Argument **III**, supra, at 17), in Kinast the Court granted the Board's Motion to reopen the evidence and permit

additional testimony on an issue which was not litigated by the parties.

The procedure in Kinast was particularly appropriate in Petitioner's case since the Referee did not determine Petitioner's fiduciary duty under the POA, as charged in the Complaint (see Argument **I**, supra, at 9). Moreover, the Referee had determined, post-trial in her Report, that Petitioner falsified evidence, which was not charged in the Complaint, and then used that finding to recommend license revocation. Petitioner was entitled to have these issues litigated. As stated by the Board in its Kinast motion to reopen the evidence, those issues had not been litigated and "were raised by the Referee's Report" **for the first time.** The Referee's letter to the Court, in face of these issues and the Court' previous decision in the Kinast case, is uncontrovertable proof of open hostility and animus against Petitioner which deprived him of constitutional impartiality in the proceedings.

As for Petitioner's Motion for New Trial, the Wisconsin Court denied the Motion, leaving Petitioner with only the recourse of an "appeal" to the Court from the Referee's Report. In this regard, the Rules of Civil Procedure were rejected by the Court contrary to their use as mandated by the Court's Rule, SCR 22.14. This deprived Petitioner of an opportunity to have the Referee correct errors and deficiencies in her findings and conclusions before an appeal was taken to the Court. It also bespeaks the Court's withdrawing independence from the Referee, as compared to a trial judge who, under the Rules of Civil Procedure, has the opportunity to address errors of the trial court prior to appeal pursuant to a Motion For New Trial.

This lack of impartality, objectivity and independence deprived Petitioner of a fair trial before this Referee and a fair appeal before the Wisconsin Court and should require this Court to grant the Petition on this issue. North v. Russell, 427 U.S. 328 (1976). It is to be noted that this Referee is not an experienced or trained jurist, and that there is no published rule of the Wisconsin Court mandating that a Referee's conduct is subject to the Court's Code of Judicial Ethics.

(2) Petitioner was denied an impartial Board investigation. In the instant case the investigation of Petitioner's ethical conduct

was performed by an attorney, appointed by the Supreme Court's Board, who was a partner in the law firm representing the residual beneficiary under Ms. Morphy's Will, the University of Wisconsin Foundation ("Foundation"). The attorney obviously had a seriously disqualifying conflict of interest, non-disclosed to Petitioner, which was exascerbated by the fact that a key witness in the case, whom he interviewed and who testified regarding Petitioner's credibility, was an attorney staff member of the Foundation. The Board adopted that investigator's report which concluded that Petitioner had acted dishonestly, and the report was adopted and constituted the basis for the Complaint filed by the Board. Petitioner raised this issue to the Referee in a Motion to Dismiss at the beginning of the case, and Petitioner's counsel argued:

> "Fourteen thousand attorneys now, not to mention the general public, who also has a stake in these kind of proceedings, have a right to expect that the Board of Attorneys Professional Responsibility, which is an arm of our State Supreme Court, will act fairly and impartially, even though there is quasi-prosecutorial quality to some of the work that they do, but the idea that a disciplinary proceeding should result from the work product of attorneys who have this kind of a conflict of interest, who appear to be working in behalf of outsiders and third parties who may have a financial interest in what happens to Mr. Harvey is unconscionable". (Tr. 7/7/94, p. 13).

The Referee denied the Motion and determined that the Wisconsin Court has ruled that due process is afforded the charged attorney by the hearing held before a Referee following issuance of a Complaint, but that the Court has denied due process proceedings in the investigatory stage before the Board. She stated:

> "Procedural due process is further afforded in this evidentiary hearing. The Complaint and the allegations in the Complaint are nothing more than that, allegations, and even if the allegations came to be so because of bad motive

> or bias of the investigator, there is ample procedural due process available for the Respondent to dispute with proof any and all of those allegations. (Tr. 7/7/94, p. 69).

This Court's opinion in the Ruffalo case, supra, indicates a similar due process defect with respect to the Ohio Bar Association charges in that case, but the Court declined to reach the issue due to the other dispositive issue which Petitioner has argued above. (Argument **II**, supra, at 13).

Although the Wisconsin Supreme Court has required due process procedures to be afforded by its Board of Attorneys Professional Competence, the Court distinguishes those procedures from its Board of Attorneys Professional Responsibility (Complainant herein) on the basis that no further hearing is granted to an applicant before the Competence Board prior to that Board's making a recommendation on an application. Disciplinary Proceedings Against Eisenberg, supra, at 344 N.W.2d 169, 171, 172. However, this is a distinction without a difference since in many cases the Board (Complainant herein) does not issue a Complaint but orders discipline without the attorney being granted a full hearing. The Board has the authority to issue a private or public reprimand without filing a complaint. SCR 21.09(2).

Attorneys charged with ethical violations should have a due process right at all stages of the investigation and hearing because, as this Court has determined, these are quasi-criminal proceedings. Once the Board decides to issue a Complaint, even if the charges are unfounded the attorney is stigmitized, his reputation is harmed, and his clients' rights potentially affected detrimentally since the hearing is a public proceeding.

Without due process protection, the investigation procedures of the Board permit virtually any type of abuse against the accused attorney.

Further, it is not possible to divorce the Board's investigation from the trial brought on by its Complaint. The Board's recommendation of discipline is presented to the Referee through its counsel, and the Referee is permitted to give it substantial weight. The defect in this process is that the Board has reached

its recommendation without due process requirements, and without benefit of having reviewed the documentary evidence or heard the witnesses testify in the public hearing before the Referee. The Board's recommendation may, therefore, represent a conclusion based on unsubstantiated evidence, incomplete investigation, bias, political motive, or other reasons unrelated to the attorney's case, and which he may not have had an opportunity to refute under due process standards, or even know about prior to the Complaint being issued.

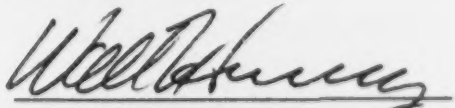
Due process must require that the Wisconsin Court mandate its Board, staff and investigators to ethically conduct themselves in a manner equal to those standards against which an accused attorney's conduct is being tested, and equal to those standards which apply to the Court itself. If those standards are flagrantly violated, should an attorney's conduct be investigated and judged by these very same persons, and be reviewed by the same appellate Court which permits the misconduct in the first instance? This Court should grant the Petition on this issue since it is an overriding problem in every state which conducts the attorneys disciplinary process in a manner similar to Wisconsin.

VIII. CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted. Alternatively, the Court should reverse summarily on the basis of In re Ruffalo.

Respectfully submitted,

Walter L. Harvey
In Pro Per



By: Walter L. Harvey

June 21, 1996

APPENDICES

APPENDIX A

No. 93-3110-D
STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Disciplinary Proceedings Against
WALTER L. HARVEY, Attorney at Law
[Filed November 14, 1995]

ATTORNEY disciplinary proceeding.
Attorney's license revoked.

PER CURIAM. Attorney Walter L. Harvey appealed from the referee's conclusion that he engaged in conduct involving dishonesty, deceit and misrepresentation by using a power of attorney given to him by an elderly relative to convert to his own use more than $140,000 of the relative's assets, conversions that were not intended, known, authorized or ratified by her. Attorney Harvey also appealed from the referee's recommendation that his license to practice law in Wisconsin be revoked as discipline for that misconduct.

We determine that the referee properly concluded that Attorney Harvey engaged in dishonesty, deceit and misrepresentation in this matter, as that conclusion is supported by facts based on testimony and documentary evidence presented at a lengthy disciplinary hearing. Attorney Harvey has failed to establish that the facts found by the referee that support the conclusion regarding his misconduct are clearly erroneous.

We further determine that the recommended license revocation is the appropriate discipline to impose for Attorney Harvey's misconduct. He abused the fiduciary position he assumed on behalf of his relative for his own financial benefit and violated the trust she had placed in him to act in her best interests. The egregious nature and extent of his misconduct renders Attorney Harvey unfit to be licensed by this court to represent others in the legal system.

Attorney Harvey was admitted to practice law in Wisconsin

in 1962 and practiced in Madison. In 1987, he relocated to Arizona, where he currently resides. He has not been the subject of a prior disciplinary proceeding. The facts found by the referee, Attorney Jean DiMotto, concern Attorney Harvey's use of a power of attorney to take more than $140,000 of a relative's assets during the six months preceding her death.

From 1959 to 1987, Attorney Harvey developed and maintained a close relationship with Elyda Morphy, a first cousin of his mother. Ms. Morphy, the widow of the former director of the University of Wisconsin band, executed a will in 1968 in which she made two specific bequests - $1000 to a church and $25,000 to Attorney Harvey - and gave the residue of her estate to the University of Wisconsin Foundation to establish a fund in her late husband's name to provide scholarships to University of Wisconsin music students. Her will named First Wisconsin National Bank as personal representative and a codicil she executed in 1976 did not substantially alter the disposition of her estate.

In December, 1980, Ms. Morphy, then 85 years old, entered a nursing home and let Attorney Harvey and his wife and daughter have whatever furniture and personal possessions she did not take with her. The nursing home required a guaranty of all expenses she might incur and Attorney Harvey signed as guarantor, but throughout her nine-year residence there, Ms. Morphy paid all of those expenses. Nursing home staff described Ms. Morphy as very intelligent, independent, careful with her assets and income, and private and precise, particularly in respect to her financial matters. Three months after entering the nursing home, Ms. Morphy had her personal attorney, Myron Stevens, prepare and she executed a power of attorney appointing Walter Harvey her attorney in fact, a power Attorney Harvey never used.

In 1984, Attorney Stevens discussed with Ms. Morphy who should have charge of her estate in the event she became incapacitated and she specified the bank she had named personal representative in her will. Attorney Stevens then suggested that her attorney in fact be given specific authorization to create a revocable living trust for her in the event of her incapacity, and he drafted such a provision in a new, dura-

ble power of attorney naming Attorney Harvey, which Ms. Morphy executed in March, 1984. Attorney Stevens sent Attorney Harvey a copy of that new power, indicating to him the purpose for it. Attorney Harvey never used that power.

Ms. Morphy executed a third power of attorney in March, 1987, on the advice of her attorney when she told him she had discarded the 1984 power. Her attorney advised her that she needed a power of attorney in force so that if she ever became incapacitated Attorney Harvey could enter into a living trust for her with the bank. The 1987 power did not differ substantially from its predecessor.

At the same time he advised her to execute a new power of attorney, Attorney Stevens suggested that Ms. Morphy execute a codicil to her will specifically giving her furniture and furnishing, personal effects and remaining tangible personal property to Attorney Harvey and he drafted a codicil to accomplish that. Ms. Morphy declined to execute that codicil because she believed it was unnecessary, as she already had made arrangements with Attorney Harvey to dispose of those items. Attorney Stevens then sent the new power of attorney to Attorney Harvey, explaining the reason for it in a cover letter. He also sent him a copy of the unexecuted codicil and set forth his reason for advising Ms. Morphy to sign it and her reason for not doing so. Over the following two years, Attorney Harvey did not visit Ms. Morphy and did not use the power of attorney. When he learned in mid-February, 1989, from a social worker at the nursing home that Ms. Morphy's physical condition had deteriorated, Attorney Harvey telephoned Attorney Stevens, who told him the 1987 power of attorney remained in effect, First Wisconsin Bank continued to be the executor named in Ms. Morphy's will and the bequests to himself and to the University of Wisconsin Foundation remained unchanged. The following month, Attorney Harvey and his wife visited Ms. Morphy and during that visit, Ms. Morphy told him words to the effect, "There is plenty in there for you and [your wife]. Go on and use it." The referee found that Ms. Morphy's statement referred to the specific bequest to him in her will, not to her funds while she was alive.

Shortly after that visit, Attorney Harvey met with Attorney Stevens and discussed using the power of attorney to obtain bank authorization for him to sign checks on Ms. Morphy's accounts and to gain access to her safe deposit box. He also discussed making funeral arrangements, locating Ms. Morphy's heirs and arranging for the nursing home to dispose of her personal possessions. The referee found that Attorney Harvey did not discuss his being appointed personal representative of Ms. Morphy's estate and Attorney Stevens its attorney.

Immediately following that meeting, Attorney Harvey had his name added on Ms. Morphy's savings and checking accounts, inventoried the contents of her safe deposit box and moved them to a new box in the name of himself and his wife. A few days later he requested and received from Attorney Stevens a copy of Ms. Morphy's tax returns for the preceding three years, which listed her annuities, stocks and certificates of deposit and her earnings from them.

Attorney Harvey first used Ms. Morphy's power of attorney on March 29, 1989, to liquidate her money market account at an investment company. Following his return to Arizona, he received a check from the company payable to Ms. Morphy and himself as her attorney in fact in the amount of $34,866.96. He cashed that check and used the proceeds for personal purposes.

Attorney Harvey again visited Ms. Morphy in late April, 1989, and her condition had worsened. She was for the most part bedridden and described as forgetful and occasionally confused. Following that visit and over the next six months, Attorney Harvey used the power of attorney on eight occasions to obtain Ms. Morphy's funds, which he used for his own purposes. He made five withdrawals from her savings account, in the total amount of $73,500; he redeemed two certificates of deposit, with a total value of $10,374; he had some of her stock sold, for which he received $21,404. The referee found that Ms. Morphy was not aware of those transfers of her assets Attorney Harvey had made to himself.

Contrary to Attorney Harvey's contention that the bank statements for Ms. Morphy's savings account and the statement reporting the liquidation of her money market account informed

her of what he termed the "gifts" he was making to himself, the referee found no evidence to establish that those statements identified the savings account withdrawals by cashier's checks payable to Attorney Harvey as attorney in fact or that Ms. Morphy in fact saw the money market account liquidation statement. The referee also found no evidence that the cashing of the certificates of deposit was reported to Ms. Morphy and also found that she did not know of the stock sale.

Attorney Harvey received most of Ms. Morphy's funds by check payable to himself as her attorney in fact. He testified that he used the $140,145 for down payments and installments on two automobiles, payments on a leased home, furniture purchases, moving expenses and a temporary residence, law practice expenses, miscellaneous living expenses and his daughter's university tuition.

During that six-month period, Attorney Harvey wrote to Ms. Morphy occasionally and telephoned the nursing home several times to inquire about her condition. He spoke to nursing home staff, as Ms. Morphy was unable to converse on the telephone.

In early September, 1989, Ms. Morphy told the social worker who had been attending to her at the nursing home that she was concerned that the balance in her savings account reported on a recent bank statement was $6000 lower than it should have been. At Ms. Morphy's request, the social worker made an inquiry at the bank and it sent Ms. Morphy an authorization for her to sign requesting information concerning the account and documentation of the disbursements from it. The bank sent a copy of that communication to Attorney Harvey as Ms.Morphy's attorney in fact. Upon receiving that copy, Attorney called the social worker and asked her to assure Ms. Morphy that her money "was fine" and said that she had $75,000 to $80,000 in her savings account. The notes the social worker wrote in Mrs. Morphy's record reported that Attorney Harvey said he had taken some of the funds from the savings account "to invest it more wisely for a larger return on [Ms. Morphy's] behalf."

In response to her inquiry, the bank informed Ms. Morphy by letter dated Friday, September 29, 1989, of the amounts and dates of deposits to and withdrawals from her savings account and included copies of the cashier's checks it had issued to At-

torney Harvey as her attorney in fact. The referee found that Ms. Morphy neither saw nor read that correspondence prior to her death, which occurred in the early hours of the following Monday, October 2, 1989.

Shortly after Ms. Morphy's funeral, Attorney Harvey met with Attorney Stevens and insisted that he be appointed personal representative of her estate. At that time, Attorney Stevens already was acting as attorney for the estate on behalf of the named personal representative and he agreed to petition the court for Attorney Harvey's appointment.

The University of Wisconsin Foundation was notified of Ms. Morphy's death and of the provision in her will making it her residual beneficiary. An official of the Foundation testified that during a three-way telephone conversation with Attorney Stevens and Attorney Harvey, he learned that Attorney Harvey, then living in California, was a beneficiary under Ms. Morphy's will and was seeking appointment to replace the bank as personal representative. The official also was told that Attorney Harvey had been Ms. Morphy's attorney in fact under a power of attorney.

When asked to consent on behalf of the Foundation to Attorney Harvey's being personal representative of the estate, the official questioned whether additional costs would result form his residing in California while the estate was being probated in Wisconsin. He also asked whether Attorney Harvey had used Ms. Morphy's power of attorney, as he was concerned that as personal representative, Attorney Harvey would be reviewing his own prior actions as attorney in fact. The official wrote to Attorney Stevens on October 12, 1989 that, based on assurances he had been given that administration expenses would not substantially increase and that Attorney Harvey had not used the power of attorney, the Foundation did not object to Attorney Harvey's appointment as personal representative.

When several weeks passed and Attorney Harvey had not provided information needed to commence estate administration, Attorney Stevens wrote to him expressing concern. The Foundation official received a copy of that letter and wrote to Attorney Stevens of his concern with the delay and reiterated that the Foundation's agreement not to object to Attorney

Harvey's appointment as personal representative was premised on Attorney Harvey's assertions that he had not acted under the power of attorney and that his appointment would not substantially increase probate expenses.

After Attorney Harvey was appointed personal representative, Attorney Stevens asked him for information concerning the estate's inventory. On March 21, 1990, Attorney Harvey sent him stock certificates that had been in the safe deposit box and stated that Ms. Morphy had asked him "to accept substantial funds from her estate as a gift" and that in 1989 she "provided" him specified amounts from stocks, savings, certificates of deposit and a money market account. Attorney Harvey did not disclose in that letter that he had obtained those funds by using the power of attorney. Prior to receiving that letter, Attorney Stevens had no knowledge of any "gifts" from Ms. Morphy to Attorney Harvey.

The referee found that Ms. Morphy did not intend to make a gift to Attorney Harvey of her funds while she was alive, rejecting as non-genuine three documents he offered to support his contention that she intended to do so. The first of those documents is a photocopy of a typewritten note purportedly prepared and signed by Ms. Morphy and dated February 15, 1981, shortly after her move to the nursing home. The note thanked Attorney Harvey for taking care of Ms. Morphy for the past 15 years and for moving her and guaranteeing her obligations to the nursing home. It states, in part, "I want you to have whatever is left of my possessions and accounts when the time comes, if any. If I outlast my accounts, then you must see me through. I will have [Attorney] Stevens prepare a legal document so you will have authority to take care of me and handle these matters." Attorney Stevens drafted the first power of attorney and she executed it the following month.

The second document the referee found non-genuine is a photocopy of a note dated March 7, 1987 that Attorney Harvey claimed to have written at the direction of Ms. Morphy. It is purportedly signed by her and states, "Walter, you should take whatever you want of my funds for you, [your wife and daughter]. You have taken care of me for so long - Just be sure [the nursing home] is paid, there is something left for scholarships

and you handle my affairs afterward -."

The referee based her rejection of those documents as evidence of Ms. Morphy's intent to make a gift to Attorney Harvey on the following: the originals allegedly were never found and not produced and were not with the originals of Ms. Morphy's other documents at the nursing home; no one other than Attorney Harvey saw Ms. Morphy sign the originals; the proffered copies were in Attorney Harvey's possession but he did not produce them in 1990 when Attorney Stevens expressed concern about the lack of corroboration for the gifts Attorney Harvey claimed Ms. Morphy had made to him. Based on that evidence, the referee found that the two documents were non-genuine, had not been signed by Ms. Morphy and were not evidence of any donative intent, testamentary or otherwise, of Ms. Morphy in respect to Attorney Harvey.

The referee further noted that none of the three powers of attorney Ms. Morphy gave Attorney Harvey specifically authorized gifting, whether to the holder of the power or to anyone else. Attorney Harvey took the position that, based on the 1981 note, the purpose of those powers was gifting. To the contrary, the referee found, the reason for the power Attorney Stevens repeatedly gave Attorney Harvey in notes and correspondence was to provide for the management of Ms. Morphy's affairs in the event she became incapacitated. Moreover, the reason he communicated to Attorney Harvey for Ms. Morphy's not having executed the codicil he prepared regarding the disposition of her personal effects was that Attorney Harvey was not to receive those by bequest but was to dispose of them after her death.

The third document rejected by the referee as evidence of Ms. Morphy's donative intent was an original, handwritten page asserted to have been prepared initially by Ms. Morphy listing questions and comments about matters she wanted to discuss with Attorney Harvey when he visited her in March, 1987. The top half of the list, apparently in Ms. Morphy's handwriting, make reference to the nursing home's telephoning Attorney Harvey upon Ms. Morphy's death and his taking charge of funeral and burial arrangements and it specifies First National Bank as her "executor," questioning whether the bank would

remove her furniture and personal effects. Attorney Harvey testified that while he was discussing those matters with her, Ms. Morphy experienced difficulty writing and he took the pencil from her and added items to the list pursuant to their conversation.

The first three of those additional items, written in all capital letters, relate to funeral and burial arrangements and Attorney Harvey's expenses in taking care of those matters and sets out his telephone number. The referee found that those three items had been written during Ms. Morphy's conversation with Attorney Harvey but found that Attorney Harvey added the fourth item subsequent to that conversation. That item states, "WALT AS PR & all Property + Accounts to Him." (Presumably "PR" is an abbreviation of "personal representative.") The referee's findings that Attorney Harvey added that item subsequent to his discussion with Ms. Morphy and that it does not authentically reflect her wishes in respect to who was to be the personal representative of her estate and regarding the disposition of her property are based on the comparatively lighter pencil impressions of the fourth item and its different capitalization pattern compared to that of the first three items.

After he received Attorney Harvey's letter of March 21, 1990 informing him of the "gifts" of Ms. Morphy's funds, Attorney Stevens told Attorney Harvey that as attorney for the estate, he would have to advise the Foundation of those gifts. Attorney Harvey agreed that Attorney Stevens would send the Foundation a copy of that letter listing those gifts. At the same time, Attorney Harvey asked Attorney Stevens to file gift tax returns for the $140,000 he had taken from Ms. Morphy's assets but Attorney Stevens declined because he felt in good conscience he could not do so.

When the foundation received a copy of Attorney Harvey's letter disclosing the transfers of Ms. Morphy's assets to himself, it immediately retained counsel to determine whether those transfers were proper. Shortly thereafter, the Foundation demanded formal administration of the estate and the removal of Attorney Harvey as its personal representative. Attorney Harvey resigned as personal representative on June 5, 1990 and was replaced by another attorney.

One year later, Ms. Morphy's estate commenced an action against Attorney Harvey to recover the funds he had conveyed to himself under the power of attorney. Attorney Harvey entered into a settlement of that litigation under the terms of which he waived entitlement to the $25,000 specific bequest under Ms. Morphy's will and agreed to pay the estate $88,196.-18, the first $40,000 of which by December 1, 1991 and the remainder by January 15, 1992. The settlement agreement provided that if those payments were not made timely, the estate would be entitled to immediate entry of judgment against Attorney Harvey for the full amount of the transfers. When Attorney Harvey did not make any payment, the estate took a judgment against him. It is asserted in this proceeding that Attorney Harvey has paid nothing toward satisfaction of that judgment, the estate remains open and no funds have been distributed to the Foundation.

Finding that Attorney Harvey's taking of Ms. Morphy's funds for his own use was not intended, known, authorized or ratified by her, the referee concluded that Attorney Harvey's use of Ms. Morphy's power of attorney constituted conduct involving dishonesty, deceit and misrepresentation, in violation of 20:8.4(c). * As discipline for that misconduct, the referee recommended that Attorney Harvey's license to practice law be revoked. The referee rejected Attorney Harvey's position that because he has stated his intention never to practice law in Wisconsin again, the protection of the public does not require suspension or revocation of his license.

In recommending license revocation, the referee took into account not only the seriousness of Attorney Harvey's misconduct in respect to the amount of funds he converted but also his failure to acknowledge the seriousness of his wrongdoing. The referee recommended that Attorney Harvey's license to practice law be revoked.

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* SCR 20:8.4 provides, in pertinent part: **Misconduct** It is professional misconduct for a lawyer to: ...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The referee rejected Attorney Harvey's position that because he has stated his intention never to practice law in Wisconsin again, the protection of the public does not require suspension or revocation of his license.

In recommending license revocation, the referee took into account not only the seriousness of Attorney Harvey's misconduct in respect to the amount of funds he converted but also his failure to acknowledge the seriousness of his wrongdoing. The referee also considered a number of aggravating factors, including the deliberate and methodical nature of his dishonesty and deceit, the fact that it occurred within a family context and victimized a relative very close to him, the brief period of time during which he converted her funds, his deceit to several persons to conceal his conduct, and his failure to make any restitution during the ensuing five years. In addition to license revocation, the referee recommended that Attorney Harvey be required to make restitution to Ms. Morphy's estate in the full amount of its judgment, including interest from the date of each of his conversations, and repay to the estate the gift tax paid for the "gifts" he reported to the tax authorities.

In his appeal from the referee's findings, conclusions and recommendation, Attorney Harvey first argued that he was denied due process by the referee's findings that the two documents purportedly signed by Ms. Morphy were non-genuine and that a portion of his notes of their visit were added after the event. That argument has no merit. His contention that the Board of Attorneys Professional Responsibility (Board) never claimed those documents were not genuine is incorrect. The record discloses that on more than one occasion the Board questioned the absence of the originals of the documents and objected to the admissibility of one of them, in part because it was a copy and had not been verified and the location of the original was unknown. Also, the Board specifically asked Attorney Harvey whether he had written the last of the four items on Ms. Morphy's list at a later time. Moreover, it was Attorney Harvey who introduced the documents to support his position that his transfers of Ms. Morphy's money constituted gifts and the burden was on him to establish that they were genuine and evidenced Ms. Morphy's donative intent.

Attorney Harvey's contention that in finding the documents non-genuine the referee improperly considered physical evidence without the benefit of expert testimony or expertise of her own might have merit were it not for the referee's specific finding that those documents were not evidence of Ms. Morphy's donative intent, testamentary or otherwise. Accordingly, the findings of non-genuineness and post-event creation do not constitute an independent, necessary basis for the referee's conclusion in respect to Attorney Harvey's dishonesty, deceit and misrepresentation. Neither do they serve as the basis of a conclusion in respect to additional misconduct. At most, the referee considered his offering of what she found to be non-genuine documents an aggravating factor in determining the discipline to be recommended. At all events, it is for this court to determine the appropriate discipline to impose for Attorney Harvey's misconduct.

Attorney Harvey next argued that the referee erred in finding that Ms. Morphy's alleged statement to him in March, 1989 encouraging him to use what she termed "plenty in there for you and [your wife]" referred not to her assets while she was alive but to the $25,000 specific bequest to him in her will. Contrary to Attorney Harvey's contention that the referee engaged in speculation and ignored the plain meaning of those words, the referee's finding is not clearly erroneous, as it is supported by the finding that the power of attorney Ms. Morphy had given to Attorney Harvey was not, as he claimed, intended primarily to enable him to make gifts to himself of her assets but to take care of her in the event she became incapacitated. Moreover, the statement attributed to Ms. Morphy is sufficiently ambiguous as to the time, the amount and the source of any purported gift to support the referee's finding.

Attorney Harvey's third argument is that the referee erred by refusing to address the issues of whether the power of attorney he held authorized him to make gifts and whether he reasonably could have interpreted it to do so. The referee stated that she did not reach those legal issues because the ultimate issue was whether Attorney Harvey breached his fiduciary duty by using the power of attorney in a manner inconsistent with the grantor' s intentions and wishes. Thus, the referee's denial of

Attorney Harvey's untimely motion to reopen the violation phase of the disciplinary hearing for the presentation of the testimony of two attorneys on the extent of authority in the power of attorney was proper.

We also reject Attorney Harvey's argument that three of the referee's evidentiary rulings constituted error. First, he asserted that the transcript of the partial deposition of Attorney Stevens, which had not been completed at the time of his death, should not have been admitted. The referee properly determined that Attorney Harvey had a full opportunity to cross-examine Attorney Stevens on the matters addressed in the portion of the transcript she admitted.

Second, the referee did not err in refusing to permit Attorney Harvey's counsel to make an offer of proof concerning a statement attributed to Attorney Stevens, which the referee ruled inadmissible as double hearsay. There is no merit to Attorney Harvey's contention that the denial of the opportunity to make an offer of proof impermissibly infringed on his right to preserve for review what he believe was error. The referee properly determined that the nature of the evidence sought to be introduced had been identified sufficiently in the record for review of the ruling. Third, the referee properly admitted the testimony of the successor personal representative regarding statements Attorney Stevens made to him during a conversation about the estate and Attorney Harvey's use of the power of attorney. The referee found applicable the exception to the inadmissibility of hearsay provided in Wis. Stat. Sec. 908.045 (6) ** authorizing the admission of statements of an unavailable declarant that have circumstantial guarantees of trustworthiness comparable to those of the specific exceptions set forth in the statute.

** Wis. Stat. Sec. 908.045 provides, in pertinent part: **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: ...(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Attorney Harvey also contended that several of the referee's findings of fact are clearly erroneous and, consequently, they and the conclusion based on them must be rejected. Attorney Harvey established only two "clear" errors in the referee's findings, neither of which is of any consequence to the referee's conclusion regarding his misconduct. The referee found that one stock sale had not been completed at the time of Ms. Morphy's death and that all of the distributions of her funds were made payable to Attorney Harvey as attorney in fact. The record, however, appears to establish that the stock transaction was completed prior to Ms. Morphy's death, although the payment of the funds extended beyond the date of death. Also, three of Attorney Harvey's five withdrawals of funds from Ms. Morphy's savings account were by check payable to him individually, not as her attorney in fact. Nevertheless, it is undisputed that Attorney Harvey used the power of attorney in each instance of his taking Ms. Morphy's funds.

The remainder of Attorney Harvey's arguments are without merit. In part, they address the referee's findings based on her assessment of the credibility of the witnesses. They also make unsupported assertions regarding the kind of misconduct the referee concluded he had engaged in and her findings in respect to the Board's having met its burden of proof.

On the basis of facts found by the referee and supported in the record, we adopt the referee's conclusion that Attorney Harvey engaged in conduct involving dishonesty, deceit and misrepresentation by using Ms. Morphy's power of attorney to convert her funds to his own use. We determine that the license revocation recommended by the referee is appropriate discipline to impose for that misconduct. The fact that Attorney Harvey was not providing professional services to Ms. Morphy renders his misconduct no less egregious or reprehensible than a conversion of funds in the course of a professional relationship. We reject Attorney Harvey's assertion, as did the referee, that in the event we determine that he has engaged in professional misconduct, a private or public reprimand should be imposed.

We do not impose the additional recommendations for disposition of this proceeding. While the referee recommended

that Attorney Harvey be ordered to make restitution to the Morphy estate in the full amount of the judgment it had taken against him, together with interest on the amount of his conversions from the date of each of them, the judgment itself should furnish adequate assurance that the estate will be made whole. In any event, should Attorney Harvey ever seek to have his license to practice law in Wisconsin reinstated, he will be required to show that he has made full restitution to the estate. SCR 22.28 (4)(k). *** We reject Attorney Harvey's position that in the matter of restitution he should be given "credit" for the $25,000 specific bequest in Ms. Morphy's will to which he waived entitlement in the settlement of the civil litigation. That is a matter for the probate court to determine.

Further, in respect to the recommendation that Attorney Harvey be required to reimburse the estate for the gift tax paid, there is no evidence in the record that in fact the estate paid a gift tax for the transfers Attorney Harvey reported as gifts. If the estate made such a payment and did not obtain a refund following Attorney Harvey's settlement of the civil action brought against him by the estate, that matter may be addressed in the event he seeks reinstatement of his license.

Lastly, we address the objection Attorney Harvey made to several items of costs asserted to have been incurred by the Board in this proceeding. In its response to that objection, the Board acknowledged that a $12 charge for its counsel's telephone conference with an attorney attempting to locate Attorney Harvey and a $20 witness fee paid to a medical records clerk whose testimony at the disciplinary hearing proved unnecessary were not properly included in the costs and asked that they be withdrawn. In all other respects, Attorney Harvey's

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*** SCR 22.28 provides, in pertinent part: "**Reinstatement**....(4) The petition for reinstatement shall show that: (...continued)

(k) The petitioner has made restitution or settled all claims from persons injured or harmed by petitioner's misconduct or, if the restitution is not complete, petitioner's explanation of the failure or inability to do so.

objection is denied.

IT IS ORDERED that the license of Walter L. Harvey to practice law in Wisconsin is revoked, effective the date of this order.

IT IS FURTHER ORDERED that within 60 days of the date of this order Walter L. Harvey pay to the Board of Attorneys Professional Responsibility the costs of this proceeding.

IT IS FURTHER ORDERED that Walter L. Harvey comply with the provisions of SCR 22.26 concerning the duties of a person whose license to practice law in Wisconsin has been revoked.

SHIRLEY S. ABRAHAMSON, J., did not participate.

APPENDIX B

[Order Of The Wisconsin Supreme Court Denying Petitioner's Motion For Reconsideration]

Office of the Clerk - Wisconsin Supreme Court:
You are hereby notified that the Court has entered the following order:

In the Matter of Disciplinary Proceedings Against WALTER L. HARVEY, Attorney at Law
Case No. 93-3110-D

On December 5, 1995, Walter L. Harvey filed a motion seeking reconsideration of the court's November 14, 1995 decision revoking his license to practice law in Wisconsin as discipline for professional misconduct. The Board of Attorneys Professional Responsibility filed a response in opposition to the motion on December 12, 1995.

There is no merit to the arguments set forth in support of the motion for reconsideration or to the arguments raised for the first time in the reconsideration motion that the costs of the disciplinary proceeding assessed against Mr. Harvey should be reduced and that a waiver or reduction of the period during which Mr. Harvey may not file a reinstatement petition is warranted.

IT IS ORDERED that the motion for reconsideration is denied. $50 costs.

SHIRLEY S. ABRAHAMSON, J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court
January 17, 1996

APPENDIX C

[Complaint Filed By The Wisconsin Board Of Attorneys Professional Responsibility]

STATE OF WISCONSIN
IN SUPREME COURT

COMPLAINT
IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST WALTER L. HARVEY HARVEY, ATTORNEY AT LAW

TO: THE HONORABLE JUSTICES OF THE WISCONSIN SUPREME COURT. State Capitol, Madison, Wisconsin.

The Complaint of the Board of Attorneys Professional Responsibility of the State of Wisconsin by Thomas J. Basting, Sr. of Brennan, Steil, Basting & MacDougall, S.C. of Janesville, Wisconsin, pursuant to SCR 22.10 alleges and shows to the court as follows:

1. That the Board of Attorneys Professional Responsibility is a body established by the Supreme Court of the State of Wisconsin and now operating under SCR 22.

2. That the respondent, Walter L. Harvey, is an attorney duly licensed to practice law in the Supreme Court and all courts in the State of Wisconsin; that said Walter L. Harvey was admitted to the practice of law in the State of Wisconsin in 1962 and that Walter L. Harvey maintains an office for the practice of law at 10105 E. Via Linda, Suite 103-348, Scottsdale, Arizona 85258-5311.

THE BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY UP0N INFORMATION AND BELIEF, ALLEGES THE FOLLOWING FACTS IN SUPPORT OF ITS REQUESTED RELIEF:

3. That on March 30, 1987, while a resident of the Attic Angels Nursing Home in Madison, Wisconsin, Mrs. Elyda M. Morphy executed a power of attorney to the respondent Walter L. Harvey; a copy of which power of attorney is attached to this complaint as Exhibit A.

4. That between March 27, 1989 and September 19, 1989, the respondent Walter L. Harvey, using said power of attorney improperly, made payments to himself from various accounts owned by Mrs. Elyda M. Morphy as follows:

DATE	AMOUNT
03/29/89	$ 34,866.96
04/24/89	35,000.00
05/15/89	15,000.00
05/16/89	5,000.00
05/16/89	182.10
06/15/89	10,000.00
06/20/89	5,000.00
06/20/89	191.94
08/09/89	8,500.00
08/31/89	5,000.00
09/19/89	21,404.22
TOTAL	$ 140,145.23

5. That said payments, upon information and belief, were made without the knowledge and consent of Mrs. Elyda M. Morphy and that in making said payments to himself, the respondent Walter L. Harvey acted in excess of those powers granted to him by the power of attorney referred to in para. 3 above, attached as Exhibit A.

6. That the respondent Walter L. Harvey, when making said payments to himself, intended to permanently deprive Mrs. Elyda M. Morphy of the possession of said funds.

THE BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY ALLEGES THAT THE AFOREMENTIONED CONDUCT ON THE PART OF THE RESPONDENT VIOLATES THE RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AS FOLLOWS:

COUNT I

7. That the conduct of the respondent as alleged above, constitutes a violation of SCR 20:8.4(c) in that the respondent Walter L. Harvey engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, the Board of Attorneys Professional Responsibility asks that the respondent, Walter L. Harvey, be ordered to answer the allegations of this complaint; that a referee be appointed pursuant to the Supreme Court Rules; and that, if upon a trial of the issues he is found to have violated the Supreme Court Rules of Professional Conduct as alleged in the complaint, that the respondent be appropriately disciplined by judgment of this court for the misconduct alleged in this complaint.

Dated this 9th day of November, 1993.

BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBIITY

By: s/_____
Thomas J. Basting, Sr.
Counsel [01008697]

P.O. ADDRESS:
One East Milwaukee Street
Post Office Box 1148
Janesville, WI 53547
TEL: 608-756-4141
FAX: 608/756-9000

EXHIBIT A
POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, THAT I, ELYDA M. MORPHY, of Madison, Wisconsin, appoint WALTER L. HARVEY, of Scottsdale, Arizona, my attorney to demand, collect and receive all moneys and to endorse, deposit, cash or otherwise receive payment of any checks, or other documents which are or shall become payable to me, and to give receipts therefor; to pay any and all of my debts and adjust and compromise any and all claims of every nature upon such terms as my attorney determines to be proper; to withdraw any money that I may have on deposit in any bank or elsewhere in whatever form the deposit may be and to execute and deliver checks or other documents therefor; to borrow, from time to time from any bank such sums of money upon such terms as my attorney determines to be proper; to manage, care for, supervise and control any estate or property which I may own and to do and perform any act with respect thereto which my attorney determines to be proper; to pay any real estate, personal property, income or other taxes which I may owe; to have access to any safety deposit box which I may have, with power to withdraw any of the contents therefrom; to sell, endorse or assign any stock certificate, common or preferred, which I may own and receive the proceeds of such sale; to execute stock or bond powers; to vote or give proxies; to exercise any warrants or rights to which I may be entitled; to sell, mortgage or convey any real or personal property which I may own and to execute and deliver any bill of sale, mortgage or conveyance which my attorney determines to be proper; to hire or discharge any employee, domestic or otherwise, and to fix his or their compensation; to sign on my behalf any income or other tax return, state or federal; hereby giving and granting unto my attorney full power and authority to do and perform all and every act and thing whatsoever in and about the premises or in the management, supervision and care of my estate as I might do personally, with full power of substitution and revocation, hereby ratifying all that my attorney or any substitute shall lawfully do or cause to be done by virtue hereof.

I authorize my attorney to enter into a revocable living trust on such terms as my attorney determines are for my best interests, with First Wisconsin National Bank of Madison, Trustee, which trust shall terminate on my death, and to assign to such trustee or its nominee any stocks or other assets which I own.

This power of attorney shall not be affected by my subsequent disability or incapacity.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at the City of Madison, this 30th day of March, 1987.

s/_____(SEAL)
Elyda M. Morphy

STATE OF WISCONSIN
COUNTY OF DANE

Personally came before me, this 30th day of March, 1987, the above named ELYDA M. MORPHY, to me known to be the person who executed the foregoing instrument and acknowledged the same.

s/_____
Myron Stevens
Notary Public, State of Wisconsin. My commission: Permanent

This instrument was drafted by Myron Stevens

APPENDIX D

[Exhibit Introduced by Petitioner At Trial -
Respondent Exhibit 3 - RX3]

February 15, 1981

Walter

I can never thank you enough for taking care of me these past 15 years. And now you have found me comfort in Attic Angels, moved me and guaranteed my security.

I want you to have whatever is left of my possessions and accounts when the time comes, if any. If I outlast my accounts, then you must see me through.

I will have Myron Stevens prepare a legal document so you will have authority to take care of me and handle these matters.

s/Elyda Morphy

APPENDIX E

[Exhibit Introduced By Petitioner At Trial -
Respondent Exhibit 7 - RX7]

Walt - 3:30 or 4 Sat.
coming
Rings -
at my death:
Nursing home will phone you
what is your number?
come as soon as possible to take
charge - Buy a casket -
no funeral - Burial at Forest Hill
cemetary
First National Bank is my Executor
Do they come & take out my
furniture & everything -?

Tell Myron - Walt coming to
take

CALL MYRON -
1) WALT COMING to TAKE CARE OF
ARRANgemenTs
--CASKET
--BURIEL
--FURNITURE & CLOTHES

2) WALT'S Expenses

3) WALTS PHONE - 602-998-7514
[Dial 1-first]
7330 E. PALO VERDE, # 25
SCOTTsdALE, Az 85253

4) WALT AS PR & all PRoperty & Accounts to Him

APPENDIX F

[Exhibit Introduced By Petitioner At Trial -
Respondent Exhibit 8 - RX8]

March 7, 1987

Walter

You should take whatever you want of my funds for you, Dolores & Karen. You have taken care of me for so long - Just be sure Attic Angels is paid, there is something left for scholarships and you handle my affairs afterward -

s/ Elyda Main Morphy

APPENDIX G

[Excerpts Taken From Referee's Single Spaced
33 Page Report To Wisconsin Supreme Court]

STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Disciplinary Proceedings Against:
WALTER L. HARVEY, CASE NO. 93-3110-D
Attorney at Law,
Respondent.

REFEREE'S REPORT

*****

24. In preparation for that visit, Mrs. Morphy had written questions and comments about these matters in pencil on the backside of a nursing home weekly activity sheet. During her discussion with the Respondent, she began to write in pencil on the bottom half of that same sheet the word, "[t]ell Myron - Walt coming to take". Because of her difficulty writing, the Respondent took the pencil and began making the notes for her. The content and form of notes he wrote at the time of that discussion were as follows.

CALL MYRON
1) WALT COMING TO TAKE CARE OF ARRANGEMENTS
-CASKET
-BURIEL (sic)
-FURNITURE + CLOTHES
2) WALT'S Expenses
3) WALTS PHONE -602-998-4514
7330 E. PALO VERDE, #25
SCOTTSDALE, AZ 85253

Subsequently, Mrs. Morphy added next to the two lines of the address the words: "Dial 1-first". Sometime after that addition, and probably in 1989, the Respondent added these words to that sheet: 4) WALT AS PR & all PRoperty + Accounts to Him.

*****

37. During the visit on March 18-19, in the presence of Mrs. Harvey, Mrs. Morphy said to the Respondent words to the effect:

> "There's plenty in there for you and Dolores.
> Go on and use it."

*****

93. Mrs. Morphy's statement on the weekend of March 18-19, 1989 to the Respondent in the presence of his wife - "There's plenty in there for you and Dolores. Go on and use it." - referred to the large personal bequest in her will, not to her monetary assets while she was alive.

*****

96. Although Mrs. Morphy was aware the Respondent was using the POA, she was not aware that he was taking her assets for his personal use.

*****

CONCLUSION OF LAW

By breaching his fiduciary duty as attorney-in-fact for Elyda Morphy under the 1987 power of attorney, by using that power of attorney to convert to his own use $140,145.23 of her assets, conversions neither intended, authorized, known to nor ratified by Ms. Morphy, the Respondent engaged in conduct involving dishonesty, deceit and misrepresentation, in violation of SCR 20:8.4(c).

*****

B. Genuineness of Documents

RX3, RX7 and RX8 essentially constitute the linchpin of the Respondent's case. According to the Respondent, these exhibits demonstrate Mrs. Morphy's donative intent to take whatever he wanted of her assets in view of their close, familial relationship. There are numerous problems with these exhibits.

RX3 and RX8, Mrs. Morphy's letters/notes to the Respondent dated February 15, 1981 and March 7, 1987 ... I find that these two documents are non-genuine, were not signed by Mrs. Morphy, and are not evidence of any donative intent, testamentary or otherwise, by Mrs. Morphy to the Respondent.

RX7 is an original document completed in pencil. The bottom half, written by the Respondent, allegedly expresses Mrs. Morphy's wishes which she wanted to communicate to Attorney Stevens. I find Nos. 1, 2 and 3 on the bottom half to authentically express Mrs. Morphy's wishes. I find No. 4 to be a later addition by the Respondent (after Mrs. Morphy's note to "Dial 1-first") which does not authentically reflect Mrs. Morphy's wishes.

I base this finding on an examination of this document, which reveals that No. 4 is written in lighter pencil than Nos. 1, 2 and 3, and that the capitalization pattern in No. 4 is different than in Nos. 1, 2 and 3 (with the exception of one word, Nos. 1, 2 and 3 are written in all capital letters, whereas, with the exception of two words and an abbreviation, No. 4 is written with a combination of capital and small-case letters).

*****

C. Mrs. Morphy's Knowledge of the Transfers

2. The documentary evidence at the hearing as to the liquidation of her Baird money market account (RX19) was a photocopy. Had this actually been sent to Mrs. Morphy, it would have been in her dresser draw (sic) file cabinet as an original statement from Baird, perhaps accompanied by a photocopy of the check, rather than both the statement and the check being photocopies. I am not convinced Mrs. Morphy ever saw the Baird statement. (emphasis supplied by Petitioner)

4. ...While Mrs. Morphy did receive monthly statements from the bank about her savings account, I doubt copies of the

cashier's checks were enclosed ...." (emphasis supplied by Petitioner)

*****

These reasons contributed to my finding that although Mrs. Morphy knew the Respondent had used the POA...she did not know of the transfers of her monies to him for his personal use.

*****

E. Meeting the Burden of Proof

Through its cross examination of the Respondent, the direct and cross examination of Mrs. Krueger, and the direct examination of Attorney Stevens, Attorney Howes and Attorney Mitby, the Board raised substantial doubts about the Respondent's credibility and the genuineness of his key documents.... (emphasis supplied by Petitioner) In addition, the Board established a series of events proving the Respondent's misconduct and the lengths the Respondent would go to construct an alternate scenario to explain his wrongdoing as "effectuating the donative intent" of the cousin who treated him like a son...Before leaving town, he began the first of nine conversions over the last six months of his cousins' life, depleting $140,145.23 of her $250,000 in assets without her knowledge or consent by using the POA in a manner and for a purpose she neither intended nor authorized.

The Board has met, if not exceeded, its burden of proof. (emphasis supplied by Petitioner)

*****

F. Conclusion

...Both parties agree that agency principles apply to use of powers of attorney and that a power of attorney evidences the existence of a principal-agent fiduciary relationship. Because the 1987 power of attorney was not used in accordance with or to effectuate Mrs. Morphy's wishes or intentions, I concluded that the Respondent breached his fiduciary duty to her in transferring her funds to his own use without her knowledge, authorization or ratification. The Board amply sustained its burden of proof in support of this conclusion; the Respondent

demonstrated himself to be unworthy of belief, and intelligent and mentally comprehensive enough to have orchestrated the scheme of conversions, just as he orchestrated his defense to these charges.

Because my decision is factually based upon the Respondent's breach of fiduciary duty by using a POA in a manner inconsistent with Mrs. Morphy's intentions and wishes, I did not reach the legal issue debated in the post-hearing briefs.

*****

II. DISCIPLINE

...It is an aggravating factor that the Respondent compounded his misconduct by ... he submitted two non-genuine documents as well as added a line to a third, original document, in an attempt to cover for his misconduct.

In summary, I recommend revocation of the Respondent's license based on the cases cited by the Board and upon these aggravating factors: ...his inadequate accounting, as fiduciary, of the converted monies; his attempts to hide his misconduct ... by submission of non-genuine and altered documents.

*****

APPENDIX H

[Transcript Excerpts Concerning Authenticity Of Petitioner's Exhibits]

July 8, 1994 -- Pages 210-211:

MR. KERSTEN: [Petitioner's counsel] Well, no, but I had understood from Mr. Basting that neither one of us is going to have a problem as to the authenticity of documents that have been used routinely in the course of these proceedings, and this is one of them.

MR. BASTING: [Board's counsel] My problem is that there now has been the suggestion that this letter was not mailed, that it was somehow couriered to the nursing home. I mean that's the first time that I ever heard that.

I have been assuming that this letter was mailed and received on the following day, and now the testimony is from Ms. Krueger that she had it in her possession on the 29th.

I think that's an important issue in this case and as far as authenticity is concerned, I told Mr. Kersten I wasn't going to be concerned, but he had not suggested that it was a couriered transfer. There's no evidence to that effect.

*****

July 8, 1994 -- Pages 362-363:

(Respondent Exhibit 3 is marked for identification)

Q [Petitioner's counsel] I show you Respondent's Exhibit 3. Could you identify that for us, please?

A [Petitioner] This is a copy of the document that Elyda had prepared in February, 1981 which I just described.

Q [Petitioner's counsel] Is that her signature at the bottom of it?

A [Petitioner] Yes, it is.

Q [Petitioner's counsel] Did you observe her sign it?

A [Petitioner] Pardon me?

Q [Petitioner's counsel] Did you observe her sign it?
A [Petitioner] No. When this was handed to me it had already been prepared and signed.
Q [Petitioner's counsel] Do you know who typed it?
A [Petitioner] No, I do not.

MR. KERSTEN: [Petitioner's counsel] I offer Exhibit 3, RX 3.
MR. BASTING: [Board's counsel] Objection, relevancy.
THE REFEREE: Overruled

*****

July 9, 1994 -- Pages 47-48:

MR. KERSTEN: I would also offer at this time exhibits RX 7 and RX 8.
MR. BASTING: I thought they had been received.
REFEREE DI MOTTO: No. 7 and 8 have not been received.
MR. BASTING: 7 is the --
REFEREE DI MOTTO: This.
MR. BASTING: That's the original note? No objection to that.
REFEREE DI MOTTO: Then it's received.
(Exhibit Number RX 7 was received into evidence)
MR. BASTING: 8 is the copy of the note. I object to that.
REFEREE DI MOTTO: And your basis?
MR. BASTING: Again, it is a copy of a document. The original no one knows where it is. Again, relevancy, and the fact that it has not been verified.
MR. KERSTEN: It has been verified I think by the witness.
REFEREE DI MOTTO: I'm going to receive it over the objection, again, interpreting the objection as the weight of the document, not to its admissibility in evidence, since it's light in and of itself.
(Exhibit Number RX 8 was received into evidence).

*****

APPENDIX I

[Transcript Excerpts From Opening And Closing Arguments Of Board's Counsel At Trial]

OPENING ARGUMENT
July 7, 1994

In March, 1987, Mrs. Morphy had attorney Myron Stevens prepare a new power of attorney to replace a power of attorney given to the Respondent Walter Harvey. The power of attorney will be introduced as evidence. And the evidence will show we believe that it did not authorize the Respondent Mr. Harvey to make gifts to himself or others or to transfer money to himself for his own use. [Tr. p. 78]

*****

CLOSING ARGUMENT
July 11, 1994

The Board is prepared in this case to accept the fact that its burden of proof in these proceedings is by clear, satisfactory and convincing evidence. And that the Board's proof in this case can't rest on doubtful or uncertain inferences. [Tr. p. 159]

*****

The only issue in this case is whether Mr. Harvey engaged in conduct inovolving dishonesty, fraud, deceit or misrepresentation in violation of Supreme Court Rule 20:8.4 (c) by making substantial gifts to himself from Elyda Morphy's estate shortly before her death under color of a Power of Attorney provided to him in 1987 by Mrs. Morphy. [Tr. p. 159]

*****

....If there's no assertion -- where there is the assertion that any of the powers granted were to be exercised for the benefit of the fiduciary rather than the principal, then specific authori-

zation in that Power of Attorney must be shown. [Tr. p. 161]

In this case, it is the position of the Board right off the starting blocks, if you will, that Mr. Harvey had absolutely no authority under the 1987 Power of Attorney to give to himself or take for himself assets from the Elyda Morphy estate, if you will, her living estate, at that time, while she was alive, without absolute authority in that document. He was in the position of a fiduciary as he stood to Elyda Morphy, and he had absolutely no right under Wisconsin law to do what he did. [Tr. p. 161-162]

*****

The story involving Walter Harvey in this case really doesn't begin until 1987. Although there was testimony about a document that we have seen a copy of from 1981, that was signed by Mrs. Morphy, but witnessed by no one. The facts in this case, I believe, for purposes of the Board's charges, really begin in 1987. [Tr. p. 164]

*****

We know, and the Court can examine that there are two relevant documents, exhibits, Respondent's Exhibits 7 and 8. Respondent's Exhibit 7 is the pencilled document with Elyda Morphy's handwriting on it, and Mr. Harvey's handwriting at the bottom half of the page....The least of -- the last of which was Walt as PR and all property and accounts to him. [Tr. p. 164-165]

*****

We submit that under all of the facts and the circumstances in this case, much of which is clearly circumstantial evidence.... [Tr. p. 181]

*****

Did the documents that Mr. Harvey claims allowed him to make these gifts to himself authorize him to do that. Clearly, as a lawyer, he should have known they did not. [Tr. p. 181]

*****

.... He tried in 1987 when he wrote down, at least we think he wrote it down at that time -- you have to examine that document yourself - he wrote down Walt is PR and all accounts to him. Mrs. Morphy didn't buy it. She went to her lawyer. She went with that document. She talked to her lawyer. She didn't appoint him PR. She didn't leave all of her accounts to him. So he helped himself. [Tr. p. 185]

*****

....We're faulting him for giving those gifts to himself without the proper legal authority under the color of a document that he knew or should have known didn't give him the right to do so. Thank you. [Tr. p. 223]

*****

APPENDIX J

[Transcript Excerpts From Closing Argument Of Petitioner's Counsel At End Of Trial]

July 11, 1994

Now we come to 1987. And here it might fairly be said that the time referred to by Mrs. Morphy back in 1981 has now come. Because she signs her letter, we're now talking -- this is RX 8 -- March 7, 1997, when she says to Walter, you should take whatever you want of my funds for you, Dolores and Karen. Just be sure Attic Angels is paid, there's something left for scholarships, and you handle my affairs. Signed Elyda Main Morphy.

Now, Your Honor, there is not one shred of evidence in this case that when Elyda Morphy signed that paper back in 1981 that she didn't know full well what it said, didn't know full well what it meant, and didn't sign this completely, knowingly and voluntarily.

Nor is there any evidence that when we come to March 7 of 1987 when she signed the letter saying you should take whatever you want, that she did so, there' no evidence of any undue influence. There's no evidence that she had suffered any deficit in her intelligence, in her strong mindedness. Sure she was physically ill at this point, but there's no evidence that she wasn't perfectly aware of her surroundings, of her possessions, and of the natural objects of her bounty specifically including Walter Harvey. And this is not a new idea that crops up in 1987, it is the culmination of an idea that she put in writing back in 1981. [Tr. p. 189-190]

*****

...And, again, no evidence whatsoever to establish that that document was not signed voluntarily with full knowledge. [Tr. p. 194, referring to Respondent's Exhibit 7]

*****

APPENDIX K

[Transcript Excerpts From Closing Remarks Of Referee DiMotto At End Of Violation Phase Of Trial, And Opening Remarks At The Beginning Of The Discipline Phase of Trial]

END OF VIOLATION PHASE
July 11, 1994

I think the only other matter, two other matters that are left before we adjourn is the matter of when the post-trial brief is due. I'm not aware that the Board intends to file one, but it's certainly their option if they so choose. I understand the Respondent does want to file on only the issue of the legal authority to make gifts to the attorney, in fact, by the attorney, in fact, under a POA. And I think that can -- I 'll give one week for that.... [Tr. p. 224]

*****

BEGINNING OF DISCIPLINE PHASE
October 14, 1994

...Counsel submitted with his witness list, that is, respondent's counsel, this statement by Mr. Nestingen and Ms. Shanebrook. I quote from the September 26, 1994 correspondence listing witnesses. Mr. Nestingen and Ms. Shanebrook will testify based upon their experience with powers of attorney and their examination of the relevant documents here that Mr. Harvey could reasonably have believed that he was empowered to use the Elyda Morphy POA as he did. Closed quote.

The offers of proof add little if anything of substance beyond what was a very accurate and succinct summary of what those witnesses would offer. So I've been given no new grounds for reconsideration, and I affirm my original order, that order and the reasons for - the order was based upon my sustaining the board's objection. The board's objection was that that testimony may well have been relevant in the violation phase of these

proceedings.

Today board counsel says, indicates that it may not have been relevant at all. I think it would have been relevant. I think it would have been acceptable expert testimony during the violation phase of the proceeding. That's where it belongs. I decided the violation phase and this testimony does not offer - does not meet the test of relevance in this dispositional phase.

My fourth basis for denying the motion is the grounds upon which I concluded that the respondent had violated SCR 20:8.4 Sub C. In my letter to counsel notifying them of that conclusion, that letter is dated August 19, 1994, this sentence is included in the first paragraph, and I quote: Upon hearing all of the testimony, evaluating the credibility of each witness, conducting a thorough and detailed review of the entire record, including all 96 exhibits, I have concluded that the respondent violated SCR 20:8.4 Sub C by breaching his fiduciary duty as attorney in law - excuse me, as attorney in fact for Elyda Morphy under the 1987 Power of Attorney by using the POA to convert to his own use $140,145.23 of her assets. A conversion neither intended, authorized nor ratified by Mrs. Morphy. Closed quote.

The key clause there is the last clause, a conversion neither intended, authorized nor ratified by Mrs. Morphy. The respondent testified and offered in the violation phase of the proceeding certain documents into evidence that were reported to be Mrs. Morphy's written indication of her donative intent to the respondent. The respondent's credibility and the genuineness of those several documents were put into issue by the board during cross-examination of the respondent, among other ways. That being the most prominent way.

I painstakingly reviewed hour upon hour every single page of the transcript from that hearing, and every single page of each of the 97 exhibits including every page of the medical records that constituted one exhibit, and I combined that review with my assessments of credibility at the time of the hearing itself as witnesses were testifying. And for reasons that will be detailed in my report to the Supreme court I found those documents to be nongenuine and the testimony surrounding them to be incredible. Therefore, my conclusion as to the

respondent's violation was based on factual grounds. I never reached the mixed issue of law and fact about whether or not the language of the POA allowed self gifting by the attorney in fact. According to the offer of proof that's been submitted on this instant motion, the two witnesses, Mr. Nestingen and Miss Shanebrook, are basing their testimony on documents to which I have already assigned no weight, and they would testify on the mixed question of law and fact as to whether the language of the POA allowed the respondent to act as he did given the documents I found to be nongenuine.

So even if I regard the offers of proof as somehow providing adequate grounds for reconsideration, they clearly demonstrate that the testimony at issue is irrelevant at this point in the proceedings. It would have no probative value now on culpability as it applies to discipline.

*****

APPENDIX L

JEAN W. DiMOTTO
ATTORNEY AT LAW
7664 OVERLOOK DRIVE
GREENDALE, WI 53129-2138
(414) 288-1674

REFEREE **COURT COMMISSIONER**

December 2, 1994

By Facsimile and By Mail

Ms. Cornelia Clark
Deputy Chief Clerk
Wisconsin Supreme Court
231 E. Capitol
P.O. Box 1688
Madison, WI 53701-1688

Re: Disciplinary Proceedings
Against Walter L. Harvey
Case No. 93-3110-D

Dear Ms. Clark,

Yesterday morning, I picked up a voice mail message left at 5:00 p.m. the previous day by Atty. Kersten indicating that he had a motion to file with me as Referee and requesting to know if he should mail it or send it by facsimile to my Marquette University office. Having received nothing by mail or facsimile, I called his office to ask that the motion be sent to me by facsimile. I then received a copy of the letter from Atty. Kersten dated November 30, 1994, addressed to your office, together with a copy of Respondent's Notice of Motion and Motion for an Extension of Time to File Motion For a New

Trial and for Expedited Handling.

Never having received a motion after I have finished my work as referee on a matter by filing my report and the record with your office, I asked for a telephone conference with counsel about the motion. Atty. Basting appeared on behalf of the Board of Attorneys Professional Responsibility (Board), and Atty. Kersten appeared on behalf of the Respondent during that call. Each attorney had several opportunities to state his position.

The Board's position is that I have no jurisdiction to decide this motion because the motion was filed with the Supreme Court, and more importantly, because both my report and the record already have been filed with the Court. (The Board therefore intends to file a response to the motion with your office, not with me as Referee.) The Board reasons that since the matter is now pending in the Supreme Court, not before the Referee, the Respondent can argue in an appeal under SCR 21.098(5) that he is entitled to a new hearing/trial for any errors in my report or while the matter was pending before me. The Board argues further that SCR 21.09(5) is intended to terminate the Referee's jurisdiction upon filing of the report and record; otherwise, there would be an endless cycle of reconsideration, new hearings, etc.

The Respondent's position is that the Referee continues to have jurisdiction to consider a motion for an extension of time and a motion for a new trial. The Respondent argues that the Referee's jurisdiction is no different than that of a trial court, and that a trial court's jurisdiction is terminated by the filing of a notice of appeal. The Respondent cites Disciplinary Proceedings Against Wood, 122 Wis.2d 610, 363 N.W.2d 220 (1995) for the proposition that if an issue is not addressed at the level of the Referee, it cannot be brought up on appeal, noting in connection with Wood that he needs "to make an adequate record."

The Respondent's motion papers further identify his position, as well as the statutes and Supreme Court rules upon which he relies. He argues, inter alia, that he "believes that the [Referee's] report contains serious errors and omissions and appears to be based in material part on matters that were not asserted or proved by the Board. As to such matters, the respondent should

be allowed to offer more proof." (Emphasis added.) His attorney argues that the record is several hundred pages long and there are 100 exhibits, and that the Respondent himself needs "to participate in work on the record and preparation of the motion" but had eye surgery on November 25, and will not be able to do so for two more weeks. In asking for an extension until January 9, 1995 to file a motion for a new trial, the Respondent relies on SCR 22.23(2), Sec. 801.15(2)(b) and sec. 805.17(3), Stats.

Lastly, in his cover letter, the Respondent asserts his "understanding" that the timely filing of a motion for a new trial (hearing) "tolls the time for appeal."

This disciplinary case was pending before me longer than any other disciplinary case over which I have presided. It was characterized by repeated motions/requests for extensions of time brought by the Respondent, and repeated motions to reconsider brought by the Respondent. I have not had the record for some time, but if memory serves me, there were many deadlines for which the Respondent requested an extension of time to meet, and most, if not all, decisions and orders (other than the Scheduling Orders) were the subject of motions to reconsider from the Respondent. In addition, after the violation phase of the proceedings was concluded and the dispositional phase in progress, the Respondent made motions which were actually unilateral submissions of further evidence pertaining to the violation issues, done not for my benefit as Referee, but for the purpose of having that information, unsubject to the adversary process, available for review by the Supreme Court on appeal. He also moved, less than two hours before the end of business on the afternoon before the disposition hearing, to re-open testimony in the violation phase of the proceedings.

Thus, when the Respondent now moves (again) for an extension of time, and argues (again) for the opportunity to offer more proof, it is a continuation of his pattern during the year these proceedings were pending before me. This hearing occupied one full week, most of which was devoted to the Respondent's evidence. All relevant evidence was received into the record, and my findings and conclusion reflect the credible evidence and the reasonable inferences therefrom. That the

Respondent disagrees with these findings and conclusion is not a basis for a new trial or an extension of time to file more motions.

The Respondent's disagreements can be fully dealt with in an appeal of my report. If I were deciding this motion, I would be inclined not to grant an extension of time for filing another motion, which, from the Respondent's present motion papers, appears again to be an attempt to unilaterally place more information and evidence into the record.

Furthermore, the Respondent does not need an extension of time to review the entire record in order to make a motion for a new trial. If, arguendo, a motion for a new trial could be made during this appeal period, such a motion would be based on my report. A review of the hearing record is done for an appeal; the Respondent's bases for wanting a new trial already are apparent to the Respondent from his reading of my report. (See numbered paragraph 2 of his motion papers.)

Additionally, I know of no provision, nor does the Respondent cite one in his cover letter (or elsewhere) that permits the tolling of the time for an appeal under SCR 21.09(5) by the filing of a motion for a new trial (hearing). Moreover, the Respondent has not made that motion.

I note that in moving for an extension, the Respondent relies on a statutory subsection that applies to extensions of time for judges to decide (not parties to make) a motion for a new trial. Thus, the Respondent has cited no statutory or rule basis for his motion for an extension.

His express intent in this motion, to file a motion for a new trial, is based ostensibly on SCR 22.23(2) and sec. 805.17(3), Stats. This latter statutory subsection is not the basis for motions for a new trial. More importantly, this statutory subsection is, in my opinion, inapplicable to disciplinary proceedings. There is a twofold basis for my opinion.

My first basis is that sec. 805.17(3) applies to bench trials before trial courts, who not only make findings of fact and conclusions of law, but also enter judgments accordingly. It cannot logically apply to hearings before referees who are not empowered by the Supreme Court to make or enter judgments in these proceedings. **

The second basis for my opinion is that sec. 805.17(3) can be invoked only via SCR 22.12(2), which allows the application of the rules of civil procedure in disciplinary proceedings only when procedure is not "otherwise provided in the rules." The procedure for what happens after the completeion of the evidentiary hearing in disciplinary cases is provided in the rules, specifically in SCR 21.09(5). Indeed, SCR 21.09 is entitled "Procedure." The procedure specified in subsection (5) is for the submission of a report by the referee and then the opportunity, within 20 days thereafter, for either party to appeal the report. There is no provision for motions for reconsideration or new trials after the submission of the referee's report; the procedure is to file an appeal of the report if there is alleged error in the report or the underlying proceedings.

This is as it should be, since jurisdiction of a disciplinary proceeding resides with the Supreme Court. The Court delegates to the referee certain functions and thereby limited jurisdiction to perform those functions. Those functions are completed upon the filing of the referee's report, after which a referee has no authority or jurisdiction unless the Court grants it for some further function. This is in contrast to a trial court, which is a court of general jurisdiction and retains jurisdiction over a matter after entry of judgment until an appeal is filed or the time for filing expires.

It is my conclusion that I no longer have any jurisdiction in this disciplinary matter, that there is no procedural provision for any post-hearing motions or relief other than an appeal of the referee's report, that the Respondent's motion has no effect on the running of the current appeal period, and that any motion that seeks to extend or enlarge the time to appeal is a matter for the Court to rule upon, not me.

Yours very truly,

/s/ Jean W. DiMotto
JEAN W. DiMOTTO
Referee

cc: Thomas J. Basting, Sr., Esq.
E. Campion Kersten, Esq.
Gerald C. Sternberg, Esq

** See, by way of analogy, reasoning at page 533-34 of Continental Casualty v. Milwaukee Metropolitan Sewerage District, 175 Wis.2d 527, 499 N.W.2d 282 (1993).